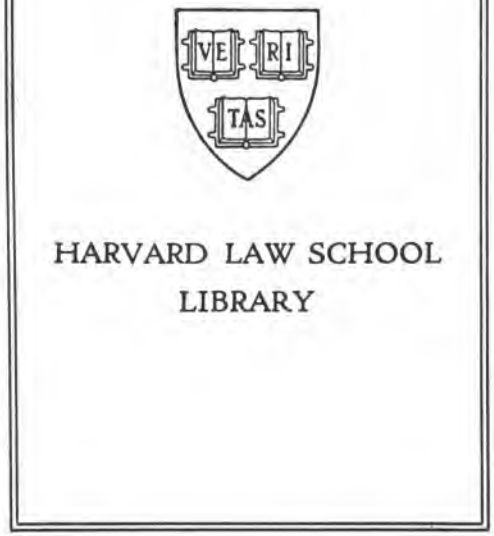

DIVISION COURT ACT,

1886.

SINCLAIR'S

DIVISION COURT ACT,

—1886,—

CONTAINING A FULL ANNOTATION OF THE DIVISION COURTS AMENDMENT ACT OF 1886,

—TOGETHER—

WITH THE INTRODUCTION OF SEVERAL LATE STATUTES THAT WILL BE FOUND OF GENERAL INTEREST AND THE SUBJECT OF FREQUENT REFERENCE,

—AND—

A LARGE NUMBER OF QUESTIONS AND ANSWERS ON SEVERAL ITEMS OF THE TABLE OF FEES FOR CLERKS AND BAILIFFS OF DIVISION COURTS:

—BY—

J. S. SINCLAIR, Q. C.,

Judge of the County Court and Local Judge of the High Court of Justice at Hamilton.

HAMILTON:

TIMES PRINTING COMPANY, 3 HUGHSON STREET NORTH,

1886.

TO

HIS HONOR

JUDGE LIVINGSTONE,

Of Simcoe,

This Work

—IS,—

WITH HIS PERMISSION,

Respectfully Inscribed.

PREFACE.

RECENT legislation has rendered a discussion of the Division Court Amendment Act, 1886, necessary by some one. Having considered the previous Statutes in reference to Division Courts, I felt it almost a duty to give my views and such authorities as I could find bearing on this Act. The Act of last session makes material changes in many respects with previous Division Court legislation. The change which has been made in the manner of altering the number and limits of Divisions in Senior and Junior Counties; the combination of causes of action of a different character; the extension of the jurisdiction of the subpœna to witnesses and the payment of witness fees; the very material change in all Garnishment proceedings; the additional facility of referring causes to arbitration; the change effected as to the possession of property seized under Attachment; the right to examine witnesses who cannot attend the trial or who reside at inconvenient distances from the place of trial; the adding of defendants and others as parties to a suit, and the assimilation of proceedings in the Division Courts with those of the High Court of Justice in regard to the bringing of actions for and against partnership firms, and the rights and liabilities of the several partners in such cases, all seemed to me to be of such importance in Division Court Law as to require as full a discussion of them as possible. That I have tried to do. In order to the practical application and working of any Statute such as the present one, certain Forms of proceedings are necessary. These I have framed and introduced at appropriate places in the work, not as authoritative, but simply as a guide.

It further appeared to me that certain other Statutes of the Session of 1886 could with propriety be given. Some of them do not bear a close reference

to ordinary practice in Division Courts yet are so important to be known by people generally as to warrant their introduction in a work of this nature.

But, what to Division Court Clerks and Bailiffs will be of so much interest and value is the large number of questions propounded by Division Court officers and others on the subject of Fees properly receivable by them, and the answers given to the same. The Clerks' and Bailiffs' Association were anxious that different items of the Table of Fees for Clerks and Bailiffs should receive consideration in answer to questions to be submitted. My opinion, for what it is worth on the different questions (75 in all), upon which information was sought, I have freely given in these pages. I may not in all cases be right, but have tried to be so. I do not believe a too strained construction of the Tariff should be given where work has been actually done by an officer, nor do I think a laxity of construction not reasonably warranted by the language employed or the circumstances of the particular case should be adopted. I have tried to keep these two views in mind, and steer clear of either extreme.

I trust this work will meet the same kindly reception that its predecessors have so generously obtained.

A book is not complete without a good Index. In the preparation of the Index to this work the greatest care has been bestowed and thoroughness of execution displayed. For its merit in that respect I have to thank Mr. Edwin Herbert Ambrose, of Hamilton, Student-at-law, and Lyman Lee, Esq,, both of whom have rendered me valuable assistance.

J. S. SINCLAIR.

Hamilton, November, 1886.

TABLE OF CASES.

A

Abraham v. Newton, 58
Adam v. Townend, 76
Alexander v. M'Near, 46
Allan v. Andrews, 59
Allan v. M'Tavish, 37
Alliance Bank of Simla v. Carey, 39
Alston v. Trollope, 39
Anderson v. Anderson, 59
Arkell v. Geiger, 55
Armour v. Carruthers, 56
" v. Walker, 26
Ashley v. Taylor, 75
Attorney-General v. Gooderham, 26
" " v. Walker, 38
Aykroyd, *in re*, 16, 17, 19, 20

B

Baddeley v. Gilmore, 62
Baggalay v. Borthwick, 10
Baird v. Almonte, 10
Baker v. Jackson, 58, 61
Balfour v. Ellison, 56
Ball v. Parker, 36
Bank of Montreal v. Taylor, 113
Bank of Ottawa v. M'Laughlin, 46
Barber v. Bingham, 75
Barclay v. Sutton, 117
Barned's Banking Co. (Limited) v. Reynolds, 37
Barnes v. Metcalf, 36
Barry v. Barclay, 61
Beal v. South Devon Ry. Co., 69
Beard v. Ketchum, 35
Beaty v. Bryce, 55
Beaufort, Duke of, v. Crawshay, 58
" " v. Earl of Ashburnham, 63
Beekman v. Jarvis, 117
Bellamy v. Jones, 58, 59, 60
Berdan v. Greenwood, 26, 59, 66, 67
Berryman v. Wise, 7
Bevan v. Wheat, 56
Bidder v. Bridges, 59, 63, 66, 67
Bingham v. Henry, 26
Birch, *ex parte*, 15
Bird v. Folger, 56
Birdsall v. The Corporation of Asphodel, *in re*, 3
Bissicks v. Bath Colliery Co., 127
Black v. Reynolds, 129
Blades v. Lawrence, 108
Boatwright v. Boatwright, 40
Boice v. O'Loane, 38
Bonsey v. Wordsworth, 17
Booth v. Garnett, 48
Booth v. Trail, 30
Bourdin v. Greenwood, 40
Bowers, *ex parte*, 15
Bowker v. Evans, 47
Boyle v. Humphrey, 4
Boyse, *in re*, Crofton v. Crofton, 26
Braddick v. Thompson, 4
Braine v. Hunt, 122
Brigham v. Smith, 34
Brown v. Brown, 60
" v. Child, 58
" v. Nelson, 56
" v. Rutherford, 40
Brydges v. Fisher, 61
Buckley v. Cooke, 63
Building and Loan Ass. v. Heimrod, 75
Bull v. Bull, *in re*, 4
Burrowes, *in re*, 109
Burwell v. Tomlinson, 119
Bushell v. Moss, *re*, 15
Butler v. Ford, 7
Button v. Thompson, 16

C

Cairns v. Water Commissioners of Ottawa, 38
Cairns v. Whelan, 18

Cameron v. Cameron, 62
" v. Campbell, 35, 37
Campbell v. Boulton, 4
Cannon v. Toronto Corn Exchange 9
Carlisle v. Tait, 70
Carmarthen and Cardigan Ry. Co., The, v. The Manchester and Milford R'y Co,, 11
Carpenter v. Vanderlip, 35
Carroll v. Fitzgerald, 38
Caspar v. Keachie, 38
Castelli v. Groom, 59
Castle v. Ruttan, 122
Cathcart v. Haggart, 36
Cazenove v. Vaughan, 64
Chadwick v. Ball, 42
Chapman v. Biggs, 43
Chasemore v. Turner, 39
Chatterton v. Watney, 43
Christie v. Conway, 55
Clarke v. MacDonald, 42, 46
Clutterbuck v. Jones, 59
Cole v. Sherard, 113
Colville, *ex parte*, 10
Commercial Bank v. Wilson, 56
Consolidated Bank v. Bickford, 127
Cook v. Grant, 35
Corporation of Haldimand v. Martin, 118, 120, 125
Corporation of Peterborough v. Edwards, 38
Cotton v. Mitchell, 38
Cowing v. Vincent, 35
Craig v. Craig, 122
Crandall v. Crandall, 37
Crippen v. Ogilvey, 59
Cropper v. Warner, 122
Cruickshank v. Corbey, 47
Cuerton, *ex parte*, 46
Curling v. Robertson, 63

D

Dalling v. Matchett, 3, 9
Dallow v. Garrold, 43
Daniel, *ex parte*, 15
Darling v. Darling, 27
Davis v. Lowdnes, 58
" v. Pembrokeshire, 10
Dawdy, *in re*, 47.
Demorest v, G. J. Ry. Co., 47
Denton v. Strong, 46.
Devanney v. Dorr, 46
Dew v. Clarke, 59
Dickson v. Jarvis, 34
" v. M'Mahon, 56
Dixon v. Grant, 37
Dodd v. Wigley, 17
Dodds v. Shepherd, 110
Doe v. Derby, 64
Doe d. Davy v. Haddon, 7
Doe. M'Gregor v. Hawke, 37
Doe. Tiffany v. Miller, 113
Dominion &c. Co. v. Stinson, 27, 63
Dougall v. Cline, 36, 37
Drinkwater v. Clarridge, *in re*, 21
Duke of Beaufort v. Crawshay, 58
" " v. Earl of Ashburnham, 63

E

Earle v. Stocker, 10
Early v. M'Gill, 59
East India Company v. Naiah, 59
Edgar v. M'Gee, 38
Edson v. Sprout, 43
Ellison v. Ackroyd, 48
Ellison v. Tuttle, 44
Elmsley v. Cosgrave, 61
Emes v. Emes, 37

F

Fairman v. Oakford, 16
Fearnside v. Flint, 38
Fellowes v. Thornton, 42
Ferguson v. Norman, 47
Finney v. Beesley, 59
Firebaugh v. Stone, 44
Fischer v. Hahn, 59
Fisher v. Berrell, 61
" v. Keane, 9
Fisken v. Chamberlain, 59
Fitzhugh v. Lee, 58
Foley v. Moran, *re*, 110
Ford v. Allen, 37.
" v. Spafford, 36
Fowler v Vail, 37
Fox v. Toronto & Nippissing Ry. Co., 25
Fraser v. Ehrensperger, 47
Freeman v. O. & Q. Ry. Co., 47
Frere v. Green, 59

G

Galbraith v. Fortune, 128
Galloway v. Keyworth, 61
Garden v. Bruce, 39
Gemmell v. Colton, 36
Gibbs v. Guild, 40
Gibson v. King, 15
Girdlestone v. Brighton Aquarium Co., 56
Goff, *re*, 37
Goslin v. Tune, 122
Goodman v. Sayers, 3, 9
Gordon v. Jennings, 30
" v. O' Brien, *re*, 16, 17
Gore Bank, The, v. Crooks, 49
Grant v. M'Donald, 35, 36
Grant v. Grant, 123
Grantham v. Powell, 35
Great N. Ry. Co. v. Mossop, 110
Green v. Humphreys, 40
Green v. Wood, 53
Gregory v. Cotterell, 121
Grill v. General Iron Screw Co., 69
" v. Iron Screw Collier Co., (Limited), 64
Grimbley v. Aykroyd, 17
Grisdale v. Boulton, 4
Grove v. Young, 58
Gunn v. Adams, 37
Gunter v. M'Tear, 61

H

Haldane v. Eckford, 62
Hall v. Pritchett, 30
Hall, *ex parte*, 56
Ham v. Lasher, 128
Hamilton v. Mathews, 35
Hamilton & Port Dover Ry. Co. v. The Gore Bank, 127
Harding and Wren, *re*, 46
Harrington v, Edison, 3, 10
Harris v. Quine, 39
Harvey v. Shelton, 4
Haskins v. St. Louis and S.E.R R. Co., 3, 10
Hawley v. North Staffordshire Ry. Co., 3
Hewitt v. Jarvis. 124
Hickman v. Lawson, 4
Holt v. Jarvis, 7
Hope v. Hope, 59
Horner v. Kerr, 70
House v. House, 36
Howell v. Met. D. Ry. Co., 43
Hubbard v. The Union F. Ins. Co. *re*, 46

I

Irwin v. Freeman, 37
Ives v. Ives, 37

J

Jackson v. Litchfield, 76
Jameson v. Jones, 64
Jepsom v. Greenaway, 58
Johnson v. Gibson, 16
Jolliffe, *ex parte*, 61
Jones v. Atherton, 117
Jones v. Brown, 36
" v. Tobin, 61
Joy v. Hadley, 62

K

Kimpton v. Willey, 17
King v. Simmonds, 15
" The, v. The Sheriff of Herefordshire, 18
King's College v. M'Dougall, 36
Kirkpatrick, *re*, Kirkpatrick v. Stevenson, 35
Klein v. Klein, 56
Knight v. Medora, *re*, 15, 42
Kraemer v. Gless, 70
Kynston v. Liddell, 46

L

Labouchere v. Wharncliffe, 9
Lampman v. Davis, 35
Langen v. Tate, 26, 59, 66
Lawson v. Vacuum Brake Co., 27
" & Hutchinson, *re*, 4
Lee v. Wilmot, 38
Leech v. Williamson, 56
Lester v. Garland, 62
Lizars v. Dawson, 35, 39
Lloyd v. Henderson, 61

Lloyd v. Key, 62
Lord v. Lee, 46
Loring v. Loring, 37
Lovell v. Gibson, 56
Low v. Morrison, 37
Lowe v. Fox, 38
Lowis v. Runney, 39
Lowson v. Canada F. M. Ins., Co., 113
Lyon v. Tiffany, 36

M

Macdonald v. The Tacquah Gold Mines Co., 43
Macfie v. Hunter, 56
Maclean v. Anthony, 122
Macnamara v. M'Lay, 120
Macpherson v. Tisdale, 15
Maddoks v. Holmes, 34
Mair v. Anderson, 26
Manby v. Manby, 39
Margate Pier Company, The v. Hannam, 6
Marshall v. Lamb, 7
Martin v. Bannister, 61, 62
" v. M'Alpine, 56
Masuret v. Lansdell, 55
May v. Harcourt, 46
Merchants Bank, v. Campbell, 124
" " v. Herson, 56
" " v. Pierson, 62
Meriden Silver Co. v. Lee, 56
Meyerhoff v. Froehlich, 35, 40
Michie v. Reynolds, 124, 125, 126, 129
Miles v. Harris, 126
Miller v. Miller, 40
Mitchell v. Foster, 71
Moffat v. Prentice, 59
Mondel v. Steele, 59
Morgan v. Mather, 10
" v. Rowlands, 40
Morphett, *in re*, 3, 10
Morris v. Boulton, 127
Morrison v Taylor, 123
Murray v. Gibson, 11
Muskoka and Gravenhurst, *re*, 46
Myers v. Baltzell, 43
Myles v. Thompson, 49

Mc

M'Combie v. Anton, 64
M'Cormick v. Berzey, 35
M'Dermott v. Donegan, 44
M'Donald v. Boice, 56
" v. Elliott, 37
M'Edward v. Gordon, 4
M'Fadden v. Stewart, 37
M'Gee v. Baird, 56
M'Hardy v. Hitchcock, 61
M'Intosh v. Great Western R'y Co., 58
M'Kay v. Grinley, 36
M'Kenna v. Everitt, 58, 59
M'Kenzie v. Harris, 56
M'Lean v. Evans, 128
M'Master v. Meakin, 117
M'Millan v. M'Millan, 63
M'Mullen & Cayley, *in re*, 4
M'Nulty v. Jobson, 4
M'Roberts v. Hamilton, 123, 124, 125, 126

N

Newcombe v. Anderson, 15
Nordheimer v. M'Killop, 27
Norton v. Lord Melbourne, 61
Norval v. Canada S. Ry. Co., 46
Notman v. Crooks, 36
Noyes v. Crawley, 37, 40

O

Oakes v. Halifax, 46
Ohlsen v. Terrero, 63
Oliver v. Dickey, 59
Olmstead v. Errington, *re*, 15
Omnium Securities Co. v. Richardson, 39
Ontario and Quebec, *in re*, 3, 10
Osborne v. Earnshaw, 16

P

Pardee v. Lloyd, 4
Pardo v. Bingham, 37
Parker v. Howell, 56
" v. Remington, 35
Patterson v. M'Kellar, 122
Pering v. Keymer, *in re*, 3
Perlet v. Perlet, 4, 9
Peterson v. Bowes, 62

Phipps v. Beamer, 55
Pirie v. Iron, 61
Pole v. Leask, 49
Pollexfen v. Sibson, 75
Pond v. Dimes, 58
Potter v. Knapp, *in re*, 9
Powers, *in re*, Lindsell v. Phillips, 38
Price v. Bailey, 66
" v. Thomas, 113
Prichard v. Gee, 59
Prince v. Samo, 63

Q

Quincey v. Sharpe, 38

R

Randall v. Lithgow, 43
Rattan v. Ashford, 115
Redford v. M'Donald, 64
Rees v. M'Keown, 15
R. v. Aberdare Canal Co., 71
R. v. Andrews 15
R. v. Bishop of St. Albans, 10
R. v. Chapman, 10
R. v. Court of Revision of Cornwall, 3
R. v. Cumberland (Justices), 62
R. v. Fee, 7
R. v. Gibbon, 10
R. v. Great Yarmouth, 10
R. v. Handsley, 10
R. v. Howard, 7
R. v. Inhabitants of Huddersfield, 58
R. v. Justices of Huntingdon, 10
R. v. Justices of Middlesex, 71
R. v. Justices of Shropshire, The 71
R. v. Lee, 10
R. v. Lefroy, 61, 62
R. v. Milledge, 10
R. v. Pawlett, 9
R. v. Sheriff of Herefordshire, 18
R. v. Verelst, 7
R. v. Wellings, 58
Rice v. Howard, 63
Ridley v. Sutton, 63
River Steamer Company, *in re*, Mitchell's Claim, 39
Roberts v. Death, 43
Robinson v. Davies, 27, 62, 64
Rogers v. Manning, 27
Ross, *re*, 35
" v. Corp. of Bruce, 4
" v. Robertson, 62
" v. M'Lay, 114
Rucker v. Hannay, 34
Ruggles v. Beikie, 37
Rushbrook and Starr, *in re*, 46
Russell v. G. W. Ry. Co., 26
Ryan v. Devereux, 63, 64

S

Saunders v. Bridges,
Scatcherd v. Kiely, 37
School Trustees of the Township of Hamilton v. Neil, 7
Scott v. North, 15
Shanly v. Grand Junc. Ry. Co., 38
Shanley v. Moore, 30
Sharpe v. Fortune, 117
Sifton v. M'Cabe, 36
Singer v. Williams Manufacturing Co., 27
Skeet v. Lindsay, 39
Sloan v. Whalen, 56
Smith v. Babcock, 27
" v. Burn, 35
" v. Greey, 27, 59
" v. Redford, 7, 37
" v. Scott, 15
Spackman v Foster, 40
Spalding v. Parker, 35
Sparkes v. Barrett, 62
Speeding v. Young, 61
Steers v. Lashley, 47
Steinkeller v. Newton, 64
Steuart v. Gladstone, 61
Stevenson v. Hodder, 35
Stewart v. Garrett, 35
St. John v. Rykert, 37
Strange v. Toronto Telegraph Co., 55
Strong's Executor v Bass, 43
Sullivan v. Corporation of Barrie, 38
Summerfeldt v. Worts, *in re*, 15
Summers v. Rawson, 61
Surr v. Walmsley, 62
Sutton v. Sutton, 38
Swift v. Cobourg & Peterborough Ry. Co., 117

T

Taylor v. Cook, 76
" v. Laird, 16
" v. Parnell, 38
Temple v. Toronto Stock Exchange, 9
Templeman and Reed, *in re*, 3, 9, 10
Thomas v. G. W. Ry. Co., 128
Thomas v. Harrop, 3
" v. Sylvester, 16
Thurlow v. Sidney, 46
Tiffany v. Thompson, 37
Tildesley v. Harper, 75
Tittenson v. Peat, 10
Trotter v. Corporation of Toronto, 38
Trust & Loan Co. v. Clarke, 37
Tucker v. Collinson, 42

V

Vandewaters v. Horton, 15
Vardon v. Vardon, 39
Vashon v. E. Hawkesbury, *re*, 10
Victoria Mutual Ins., Co., v. Davidson, 11
Vyse v. Brown, 43

W

Wade v. Dowling, 10
Wadsworth v. Bell, 127
Waldie v. Burlington, *re*, 110
Walker v. Fairfield, 125
" v. Rooke, 43, 76
" and Brown, *in re*, 47
Warner v. Mosses, 58, 61
Watefield v. West Riding & G. Ry. Co., 10
Waters v. Daly, 4
Watkins v. Washburn, 35
Watson v. Lindsay, 38
" v. M'Donald, 27
Webb v. Stenton, 43
Webster v. Haggart, 47
Western of Canada Oil, Lands, and Works Co., *in re*, 63
Wheeler v. Murphy, 121
Whiley v. Whiley, 80
White v. Lord, 56
" v. Sharp, 3, 10
Whitehead v. Fothergill, 115
Whitely v. MacMahon, 4, 46
Wilby v. Elgee, 40
Wildes v. Russell, 10
Wilks, *ex parte*, 15
Wilkinson v. Page, 48
" v. Verity, 40
Willet v. Atterton, 34
Williams v. Roblin, 4
Willoughby v. Willoughby, 3
Willson v. York, 46
Wilson v. Brett, 69
" v. DeCoulon, 26
" v. Wilson, 56
Wolton v. Gavin, 7
Wood v. Perry, 17
Worts v. Worts, 10
Wright v. Merriam, 35
" v. Wilkin, 62

Y

Young v. Bulman, 3
Youngs, *in re*, Doggett v. Revett, 56

THE
DIVISION COURTS AMENDMENT ACT, 1886.

49 Victoria, Chapter 15, (Ontario.)

AN ACT TO AMEND "THE DIVISION COURTS ACT."

[*Assented to 25th March, 1886.*]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

1. Section 11 of *The Division Courts Act* is hereby repealed, and the following substituted therefor : R. S. O. c. 47, s. 11, repealed.

11.—(1) The County Judge, the Sheriff, the Warden of the County, and the Division Court Inspector may, subject to the restrictions in this Act contained, appoint, and from time to time alter the number, limits and extent of every division, and shall number the divisions, beginning at number one, but no resolution or order made under the provisions of this section shall be altered or rescinded, unless public notice of the intention so to alter or rescind or that application will be made to alter or rescind, is made and proclaimed in open Court at the next previous sittings of the General Sessions of the Peace. Alteration of number and limits of divisions

(2) The Judge shall cause the Sheriff, Warden and Inspector to be notified of any application, and of the time and place at which the same will be considered.

Formerly any alteration of the number, limits and extent of any Division Court could only be made by the Justices of the Peace for each County in General Sessions assembled: Sinclair's D. C. Act, 9.

Such alteration could only be made after public notice of the intention so to do had been publicly given at the next previous sittings of such General Sessions of the Peace: Sinclair's D. C. Act, 9-10.

The anxiety displayed by interested parties either to reduce or increase the area of Division Courts, or to establish new divisions, has not unfrequently of late years been the cause of unseemly controversy and contention, and the Courts of General Sessions have in some instances been scenes of heated discussion and angry debate. Justices of the Peace who had never done a Magisterial act before nor ever previously attended a sittings of General Sessions in a public capacity would be found among the active partizans of contending parties. They came for a certain purpose and their zeal for friends seldom caused them to falter in attempting its accomplishment. The limits of divisions in many cases were not settled on questions of right, but by force of numbers. Interested parties obtained by active canvass that which could not otherwise have been obtained. The act of the majority was seldom the result of quiet, sober judicial discussion. Such a state of affairs could not continue. The effect would undoubtedly be pernicious, and the Legislature has wisely committed to another and new tribunal the determination of such matters.

It will be observed that the power which Justices in Sessions previously possessed to appoint and from time to time to alter the numbers, limits and extent of every division is now committed by this section to the County Judge, the Sheriff, the Warden of the County and the Division Court Inspector.

This section is somewhat obscure in its phraseology and its construction is consequently doubtful. At first sight it may seem that the tribunal here created might make *one* change without the necessity of making proclamation of the intention at the next previous sittings of the General Sessions of the Peace. It will be observed that the provision as to notice more particularly refers to a "resolution or order made under the provisions of *this* section."

Whatever doubt there may be in respect to the necessity for "public notice of the intention to alter or rescind" being given, questions should be saved in all cases where the limits and extent of divisions are already established, by adopting the safer course and requiring it to be done. It is a matter of public interest, and the plainest principles of justice demand that the utmost publicity should be given of the intention to change. Whatever a literal interpretation of the section in question may be there can be no doubt that the spirit of law will be best observed by the tribunal here constituted in all cases requiring evidence of the public notice having been given by proclamation before acting under this section.

When all preliminary requirements have been duly observed, it will be the duty of the Judge to give, or cause to be given, due and timely notice to the other members of the tribunal of the time and place at which any application will be considered. Parties making the application and those opposing it should be duly notified of the time and place of hearing. Sinclair's D. C. Act, 31, D. C. Law, 1885, page 221, and cases there cited. It is submitted too that in all cases there should also be public notice, so that all other parties interested in or affected, or that might be affected by the proposed change, should have an opportunity of being heard before any decision is arrived at.

Where the Statute requires notice to be given of the proposed change mentioned in this section, any decision in respect to the same would, it is submitted, be invalid in the absence of such notice: *In re Birdsall* v. *The Corporation of Asphodel*, 45 U. C. R. 149; *R.* v. *Court of Revision of Cornwall*, 25 U. C. R. 286: Sinclair's D. C. Act, 14-15.

The Statute does not so declare, but it is submitted that the decision of the *majority* of the members of the tribunal would be good and that the whole number need not be unanimous in their decision: R. S. O. Chapter 1, Section 8, Sub-section 33, *In re Ontario and Quebec*, 6 L. J. N. S. 212; but in order to justify a decision by less than the whole number who heard the question, there should first be an opportunity for a full discussion and a final refusal to agree: *Goodman* v. *Sayers*, 2 J. & W. 242; *Dalling* v. *Matchett*, *Willes*, 215; *In re Morphett*, 2 D. & L. 967; *Young* v. *Bulman*, 13 C. B. 623; *White* v. *Sharp*, 12 M. & W. 712; *Thomas* v. *Harrop*, 1 S. & S. 524; *In re Pering* v. *Keymer*, 3 A. & E. 245; *In re Templeman and Reed*, 9 Dowl. 962; *Hawley* v. *North Staffordshire Ry. Co.*, 2 De Gex & S. 33; *Willoughby* v. *Willoughby*, 9 Q. B. 923.

Neither one could delegate his authority: *Harrington* v. *Edison*, 11 U. C. R. 114; *Haskins* v. *St. Louis and S. E. R. R. Co.*, 109 U. S., 106; Sup. Ct.

Evidence should not be taken in the absence of interested contesting parties: *Campbell* v. *Boulton*, 1 U. C. R. 407; *Hickman* v. *Lawson*, 8 Grant 386; *Williams* v. *Roblin*, 2 P. R. 234; *McNulty* v. *Jobson*, 2 P. R. 119; even though it might not influence the decision: *Waters* v. *Daly*, 2 P. R. 202; *McEdward* v. *Gordon*, 12 Grant 333; *Whitely* v. *MacMahon*, 32 C. P. 453; and an opportunity should be given to adduce all proper testimony: *Grisdale* v. *Boulton*, 1 U. C. R. 407; *In re McMullen & Cayley*, 2 U. C. R. 175; *In re Bull* v. *Bull*, 6 U. C. R. 357; *Boyle* v. *Humphrey*, 1 P. R. 187; *Perlet* v. *Perlet*, 15 U. C. R. 165; *Braddick* v. *Thompson*, 8 East, 344. Nor should there be private conversations with one of the parties: *Re Lawson & Hutchinson*, 19 Grant 84; *Ross* v. *Cor. of Bruce*, 21 C. P. 548; *Pardee* v. *Lloyd*, 26 Grant 374; *Harvey* v. *Shelton*, 7 Beav. 455.

2. Section 13 of the said Act is amended by striking out the words "Justices of the Peace of the Junior County in General Sessions assembled" where they occur, and inserting instead thereof the words "the Judge of the County, the Sheriff, the Warden of the County, and the Inspector of Division Courts." R. S. O. c. 47, s. 13, amended.

The 13th Section of the Division Courts Act—Sinclair's D. C. Act, pages 11 and 12—as amended by this Act will now read as follows:—(the new part in substitution of the former words being in italics:)

"Where a Junior County separates from a Senior County or Union of Counties, the Division Courts of the United Counties which were before the separation wholly within the territorial limits of the Junior County, shall continue to be Division Courts of the Junior County, and all proceedings and judgments shall be had therein, and shall continue proceedings and judgments of the said Division Courts respectively; and all such Division Courts shall be known as Division Courts of such Junior County by the same numbers respectively as they were before, until *the Judge of the County, the Sheriff, the Warden of the County, and the Inspector of Division Courts* appoint the number, limits and extent of the Divisions for Division Courts within the limits of such Junior County, as provided in the eleventh section of this Act."

This is in effect carrying out the same idea in regard to Junior Counties as is provided for in respect to changes in other Counties, by constituting a tribunal to make such changes different from that heretofore existing. The tribunal here meant is the Judge, Sheriff and Warden of the *Junior* County, and the Inspector of Division Courts.

What has been said in the notes to section 1, will have application to this section also. Reference may also be made to the notes to section 3.

R. S. O. c. 47, s. 14, amended

3. Section 14 of the said Act is amended by striking out the words "Justices of the Peace of any County in General Sessions assembled" where they occur, and inserting instead thereof the words "Judge of the County, the Sheriff, the Warden of the County, and the Inspector of Division Courts."

The 14th Section of the Division Courts Act—Sinclair's D. C. Act, pages 12 and 13—as amended by this Act will now read as follows:—(the new part in substitution of the former words being in italics:)

"Whenever *the Judge of the County, the Sheriff, the Warden of the County, and the Inspector of Division Courts*, alter the number, limits or extent of the Division Courts within such County, all proceedings and judgments had in any Division Court before the day when such alteration takes effect shall be continued in such Division Court of the County as the Judge directs; and shall be considered proceedings and judgments of such Court."

It will be observed that the object of the Legislature has been to substitute these officers for the Court of General Sessions of the Peace, for the purpose of making the alterations mentioned in the 13th and 14th sections of the Division Courts Act. The Legislature has also declared that after the alteration contemplated by the statute has been made the previous proceedings and judgments shall be continued in such Division Court of the County as the Judge directs.

Should any member of this tribunal omit to take the oath of office, or some other necessary act or thing before entering upon his official duties, or should the Warden be subsequently declared unduly elected or become otherwise disqualified, yet the action of the tribunal (being of a judicial nature), would not be illegal: *The Margate Pier Company* v. *Hannam*, 3 B. & Ald. 266.

The law raises a presumption in favour of the regular appointment or election of an officer from his having acted in an official capacity and would

do so in this case: *R.* v. *Verelst*, 3 Camp. 432; *Berryman* v. *Wise*, 4 T. R. 366; *Doe. d. Davy* v. *Haddon*, 3 Doug. 310; *Marshall* v. *Lamb*, 5 Q. B. 115; *Wolton* v. *Gavin*, 16 Q. B. 48; *Butler* v. *Ford*, 1 Cr. & M. 662; *R.* v. *Howard*, 1 M. & Rob. 187, and other cases cited at pages 167-169 of the 4th Edition of Taylor on Evidence, section 139: *Holt* v. *Jarvis*, Draper 190; *Smith* v. *Redford*, 12 Grant 316; *School Trustees of the Township of Hamilton* v. *Neil*, 28 Grant 408; *R.* v. *Fee*, 2 Ont. R. 107.

R. S. O. c. 47, s 17, repealed.

4. Section 17, and sub-sections 2 and 3 of said Act are hereby repealed, and the following substituted therefor:

Regulation of limits on separation of a county.

11. The Judge of the County, the Sheriff, the Warden of the County, and the Inspector of Division Courts, at a meeting to be called for the purpose, or at any adjourned meeting, shall, within three months after the issue of any proclamation for separating a Junior from a Senior County, appoint the number, (not less than three, nor more than twelve) the limits and extent of the several Divisions within such County, and the time when such change of Divisions shall take place, and no resolution or order made under the provisions of this section shall be altered or rescinded, unless public notice of the intention so to alter or rescind is made and proclaimed in open Court at the next previous sittings of the General Sessions of the Peace.

The repealed section and sub-sections will be found at pages 13 and 14 of Sinclair's D. C. Act. This section has in view the same object as the previous sections have, namely: The vesting in the officers therein named of the authority which formerly belonged to the Justices at General Sessions. In other respects the section is substantially the same as the repealed clause, except that under the present section a limit of three months after the proclamation instead of at the first sittings of the General Sessions thereafter is fixed for the performance of the duty which the section prescribes. After the number, limits and extent of the several Division Courts have been appointed in the County (that is what during the union

of the Counties was called the "Senior County,") and the time when such change of Division shall take place, there cannot be any order or resolution changing the same, unless public notice of the intention to do so is made and proclaimed in the manner pointed out by the statute. Under the 1st section it will be seen that proclamation is in all cases advised, but under this section from its context and the necessity of the case it is submitted that the first meeting may be held without proclamation first being made at the General Sessions. As to the necessity for the notice and proclamation, see the notes to the 1st section of this Act. The notice should be in writing, filed by the Clerk of the Peace and entered at length in the record of proceedings of the General Sessions, together with the fact of proclamation having been made, and when so made, and by whom the notice was presented. It does not appear necessary that the notice or proclamation should be given or made by or on behalf of any particular person, yet it would seem exceptional that a stranger to the County could cause the proceedings to be taken, As no particular time is prescribed for the making of proclamation at the Court of General Sessions as is prescribed under some other statutes, (R. S. O., Chapter 25, Section 17), it could be made at any time during the sittings: *R.* v. *Pawlett*, L. R. 8 Q. B. 491. It will be observed that the notice says proclamation must be made "at the *next previous* sittings of the General Sessions of the Peace." Should the persons mentioned in this section not act in pursuance of its provisions before the sittings of the General Sessions next after the making of such proclamation, they would have no power to do so afterwards without notice being given afresh. The section does not prescribe who shall call the meeting as is mentioned in the first section of this Act, but as the Judge is first mentioned in the section, probably he should do so. The other persons mentioned should have ample notice of the time and place of meeting, and if not, the action of those present, not being all, would probably be held illegal. A full opportunity of discussing the question should be afforded each member of the tribunal, and if any resolution or order was made by those present, in the absence of that, would be bad: *In re Pering* v. *Keymer*, 3 A. & E. 245; *In re Templeman & Reed*, 9 Dowl. 962; *In re Potter* v. *Knapp*, 5 P. R. 197; *Fisher v. Keane*, 11 Ch. D. 353; *Cannon* v. *Toronto Corn Exchange*, 5 App. R. 268; *Labouchere* v. *Wharncliffe*, 13 Ch. D. 346; *Temple* v. *Toronto Stock Exchange*, 8 Ont. R. 705; and the cases cited in the notes to section 1.

A majority of the members of this tribunal present could make a valid decision provided all had due notice of the meeting and full opportunity of discussion: *Goodman* v. *Sayers*, 2 J. & W. 242; *Dalling* v. *Matchett*, Willes,

215: *In re Morphett*, 2 D. & L. 967; *White* v. *Sharp*, 12 M. & W. 712; *In re Ontario and Quebec*, 6 L. J. N. S. 212, R. S. O., Chapter 1, Section 8, Subsection 33: *Worts* v. *Worts*, 22 L. J. N. S. 282.

If the said officers exercised their judgment honestly and consistently with legal principles the resolution or order, if good on its face, could not be reviewed: *Baggalay* v. *Borthwick*, 10 C. B. N. S. 61.

It would not be so if made corruptly or in disregard of the plain principles of law or justice: *Tittenson* v. *Peat*, 3 Atk. 529; *Morgan* v. *Mather*, 2 Ves. Jr. 15; or if any one of them was personally interested in the subject matter: *Earle* v. *Stocker*, 2 Vern. 251; for he could not be judge in his own cause: *R.* v. *Bishop of St. Albans*, 9 Q. B. D. 454.

Should any member of the tribunal, the Warden for instance if a Division Court Clerk, be interested in extending the limits of his own Division he would be incapable of acting: Sinclair's D. C. Act 17 and the cases of *R.* v. *Justices of Huntingdon*, 4 Q. B. D. 522; *R.* v. *Milledge*, 4 Q. B. D. 332; *R.* v. *Handsley*, 8 Q. B. D. 383; *Re Vashon* v. *E. Hawkesbury*, 32 C. P. p. 203; *Baird* v. *Almonte*, 41 U. C. R. 415; *R.* v. *Lee*, 9 Q. B. D. 394; *Davis* v. *Pembrokeshire*, 7 Q. B. D. 513; *R.* v. *Great Yarmouth*, 8 Q. B. D. 525; *R.* v. *Gibbon*, 6 Q. B. D. 168; *Watefield* v. *West Riding & G. R'y Co.*, L. R. 1 Q. B. 84; *Ex parte Colville*, 1 Q. B. D. 133; *Wildes* v. *Russell*, L. R. 1 C. P. 722; *R. & J's*, Digest 1972; *R.* v. *Chapman*, 1 Ont. R. 582.

The resolution or order should not be made separately but while all are together: *Wade* v. *Dowling*, 4 E. & B. 44, and cases cited in the notes to section 1; and if one was excluded from the meeting by force or fraud the action of the rest would be illegal: *In re Templeman & Reed*, 9 Dowl. 962. If the tribunal by this section constituted should exceed its authority, it is needless to say that the resolution or order so made would be void as to such excess, and possibly as to all.

The members of this tribunal could not delegate their authority. Each must personally perform his duties: *Harrington* v. *Edison*, 11 U. C. R. 114; *Haskins* v. *St. Louis and S. E. R. Co.*, 109 U. S. (Sup. Court.) 106.

5. Section 37 of the said Act is hereby amended by adding after the word "summonses," and before the word "orders," in the first line thereof, the words "all notices filed by any party to the action." R. S. O. c. 47, s. 37 amended

The 37th section of the Division Courts' Act, as amended by this section, will now read as follows:—"The Clerk shall cause a note of all summonses, *all notices filed by any party to the action*, orders, judgments, executions and returns thereto, to be from time to time fairly entered in a book to be kept in his office: and shall sign his name on every page of such book, and such signed entries, or a copy thereof, certified as a true copy by the Clerk, shall be admitted in all Courts and places as evidence of such entries and of the proceedings referred to thereby, without any further proof."

The amendment made by this section are the words given above in italics. The reader is referred to Sinclair's D. C. Act, pages 31 and 32, for what the writer has to say on this section, and in addition thereto to Sinclair's D. C. Law, 1885, 199-205; *The Carmarthen and Cardigan Ry. Co.* v. *The Manchester and Milford Ry. Co.*, L. R. 8 C. P. 685: *Murray* v. *Gibson*, 28 Grant 12: *Victoria Mutual Ins. Co.* v. *Davidson*, 3 Ont. R. 378.

We presume that the reason for this amendment must have been the fact that some of the Clerks were in the habit of not entering in their Procedure Book the receipt of notices filed with them by parties to the action. A true and full record should be kept by the Clerk of all proceedings in every suit in his Court, and we think the general rule hitherto has been to do so. A question may arise as to the meaning of the words introduced "all notices filed by any party to the action." It may be argued that the language employed only applies to notices of a Statutory nature, where, in fact, some legislative enactment requires a notice to be filed with the Clerk and not to notices which parties may consider necessary or proper to file in the course of the suit, according to the circumstances of the case, though not declared necessary by Statute. The writer does not express any opinion as to which view is correct, but advises that in all cases where any party to a suit, or his representative, requests the Clerk to file any notice in the cause, to do so and make the entry which this amendment requires. It is better that the Procedure Book should

contain entries of proceedings not strictly authorized by Statute than any that might be authorized should be omitted. It is not necessary that more than a "note" of the different proceedings should be made, but it should be sufficiently full to inform any person other than the Clerk of the nature of the proceeding and its purport. In fact the "entries" should be a short and concise record of the different proceedings in the cause, in regular and chronological order, and intelligible to ordinary business people. The entries should neither be too brief nor too prolix.

6. Section 54 of the said Act is amended by adding the following sub-section thereto; R. S. O. c. 47, s. 54, amended.

(4) Claims combining;

(a) A cause or causes of action in respect of which the jurisdiction of the Division Courts, is by the foregoing sub-sections of this section, limited to $60, which causes of action are hereinafter designated as class (a) and Combining causes of action.

(b) A cause or causes of action in respect of which the jurisdiction of the said Courts, is by the said sub-sections limited to $100, which causes of action are hereinafter designated as class (b)

may be tried and disposed of in one action, and the said Courts shall have jurisdiction so to try the same: provided, firstly, that the whole amount claimed in any such action in respect of class (a), shall not exceed $60; and that the whole amount claimed in any such action in respect of classes (a) and (b) combined, or in respect of class (b) where no claim is made in respect of class (a), shall not exceed $100.

(5) The finding of the Court upon the claims when so joined as aforesaid shall be separate.

The 54th Section of the Division Courts Act will now read as follows:

"The Judge of every Division Court may hold plea of, and may hear and determine in a summary way for or against persons, bodies corporate or otherwise:

1. All personal actions where the amount claimed does not exceed sixty dollars (D. C. Act 1880, section 3) and

2. All claims for debt or for any sum payable under or upon any contract for the payment of money, or for the payment in labour or in any kind of goods or commodities, or in any other manner than in money, where the amount or balance claimed does not exceed one hundred dollars; and except in cases in which a jury is legally demanded by a party as hereinafter provided, the Judge shall be sole Judge in all actions brought in such Division Courts, and shall determine all questions of law and fact in relation thereto, and he may make such orders, judgments, or decrees thereupon as appear to him just and agreeable to equity and good conscience, and every such order, judgment and decree shall be final and conclusive between the parties.

3. All claims for the recovery of a debt or money demand, the amount or balance of which does not exceed two hundred dollars, and the amount or original amount of the claim is ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents:

(4) *Claims combining:*

(a) *A cause or causes of action in respect of which the jurisdiction of the Division Courts, is by the foregoing sub-sections of this section limited to $60, which causes of action are hereinafter designated as class (a) and*

(b) *A cause or causes of action in respect of which the jurisdiction of the said Courts, is by the said sub-section limited to $100, which causes of action are hereinafter designated as class (b)*

may be tried and disposed of in one action, and the said Court shall have jurisdiction so to try the same: provided, firstly, that the whole amount claimed in any such action in respect of class (a) shall not exceed $60; and that the whole amount claimed in any such action in respect of classes (a) and (b) combined, or in respect of class (b) where no claim is made in respect of class (a) shall not exceed $100.

(5) *The finding of the Court upon the claims when so joined as aforesaid shall be separate.*"

Hitherto it has been considered improper to join these two classes of action in the same suit, but now a plaintiff may join both, claiming and recovering on both causes of action, or in actions of debt only up to $100. For instance, a plaintiff could claim and recover $60 on class (a) and $40 on class (b) or *vice versa*, or in respect of class (b) where no claim is

made in respect of class (*a*) to the amount of $100. In no case can the recovery on both claims be for more than $100, but the finding of the Court upon the claims so joined must be separate. The Judge's minute of judgment may be in these words :

" Judgment for the plaintiff for $ in respect of the claim for $ and for $ in respect of the claim for $ and $ costs : to be paid in days (*or* forthwith)."

Add " on verdict by jury," *if such be the fact.*

The effect of this provision will be to render separate suits for each cause of action unnecessary. It will be observed that there may be several causes of action included in each class, but the amount must not in both classes exceed the prescribed sum of $100.

If a suit within the jurisdiction of a Division Court is brought in the High Court of Justice, Division Court costs only will be allowed, unless there are circumstances justifying the action being brought in the High Court : *Vandewaters* v. *Horton*, 9 Ont. R. 548.

A promissory note, cheque or other like instrument, given wholly or partly in consideration of a gambling debt, or for spirituous or malt liquors drunk in a tavern or alehouse, even though in the hands of an innocent holder for value, is not suable in a Division Court : *In re Summerfeldt* v. *Worts*, 12 Ont. R. 48. It was also held in that case that notice of such defence need not be given by a defendant, but where such notice is necessary neither prohibition nor certiorari will lie in the absence of such notice : *Re Knight* v. *Medora*, 11 Ont. R. 138. Where a claim is sued in a wrong Division, and pending an application for prohibition, an order is made transferring it to the proper Court, the defendant is entitled to costs of the application for prohibition : *Re Olmstead* v. *Errington*, 11 P. R. 366.

As to garnishment by and the lien of an innkeeper or boarding-house keeper in actions in the Division Court, and who is such : See Sinclair's D. C. Law, 1884, 1-16 ; *Rees* v. *McKeown*, 7 App. R. 521 ; *R.* v. *Andrews*, 25 U. C. R. 196 ; *Scott* v. *North*, L. R. 2 C. P. 270 ; *Newcombe* v. *Anderson*, 11 Ont. R, 665 ; *Smith* v. *Scott*, 9 Bing. 14 ; *Gibson* v. *King*, 10 M. & W. 667 ; *Ex parte Birch* 2 M. D. & D, 659 ; *King* v. *Simmonds*, 1 H. L. Cas. 754 ; *Ex parte Daniel*, 7 Jurist, 290 ; *Ex parte Wilks*, 2 M. & A. 667 ; *Ex parte Bowers*, 2 Deacon 99.

Where the Judge in the Division Court finds as a fact that an article in dispute is a chattel and not part of the freehold, prohibition will not be ordered : *Re Bushell* v. *Moss*, 11 P. R. 252. Untaxed costs due a party are the subject of garnishment in the Division Court : *Macpherson* v. *Tisdale*, 11 P. R. 261.

Where premises were rented for a year at $125 a month, no formal lease being made and four months rent became due, it was held that separate plaints for three instalments of rent was the splitting of a cause of action within section 59 of the Division Courts Act: *Re Gordon* v. *O'Brien*, 11 P. R. 287. With all due respect the writer questions the correctness of the conclusion at which the learned Judge arrived in this case for the following reasons: The agreement between the parties operated as a demise of the premises for one year as effectually as if it had been under seal: *Woodfall's Landlord and Tenant*, 8th Ed. 78, R. S. O., Chapter 98, Section 4; *Osborne* v. *Earnshaw*, 12 C. P. 267.

Debt for rent was maintainable after the passing of the Common Law Procedure Act: *Woodfall's Landlord and Tenant*, 8th Ed. 656; *Thomas* v. *Sylvester*, L. R. 8 Q. B. 368; although by that statute a form of declaration was given differing from the old declaration for rent: *Woodfall*, 8th Ed. 1006.

The defective information conveyed by this form was pointed out in *Johnson* v. *Gibson*, 1 E. & B. 415. The plaintiff could either declare specially upon the demise for the rent or for use and occupation, in such a case as this: *Woodfall*, 8th Ed. 656, 663, 1006. The special manner of declaring for rent was frequently considered preferable.

Division Court law prescribes a concise method of stating such a cause of action as this, but not any statute that the writer is aware of changes the foundation of an action for rent even on a demise by parol.

The Editor of *Woodfall*, 8th Ed. 1006, says in regard to an action on a demise for rent as here, that "Every quarter or half year's rent (according to the reservation), is a *several* debt for which distinct actions may be brought."—See the authorities there cited. As illustrative of this view reference may also be made to: *Taylor* v. *Laird*, 1 H. & N. 266; *Fairman* v. *Oakford*, 5 H. & N. 635; *Button* v. *Thompson*, L. R. 4 C. P. 330.

If the plaintiff had the right to bring several actions for the several monthly instalments of rent as they became due, how then was that right taken away by the facts appearing in the report of the case?

The principle of the well-known case of *In re Aykroyd*, 1 Ex. 479, is invoked here to shew that the suing in separate actions in the Division Court for three several instalments of rent, in the aggregate beyond the jurisdiction of the Division Court, is *the splitting* of a cause of action within the prohibition contained in the 59th section of the Division Courts Act. No doubt if the case just cited is applicable to the one we are now discussing, the opinion of the learned Judge is unassailable, for the English case was decided upon the language of a statute to which the 59th section of our Act bears an undistinguishable resemblance.

But it is submitted that the questions presented for adjudication in the case of *Re Gordon* v. *O'Brien*, 11 P. R. 287, are quite distinguishable from *Aykroyd's* case in several essential particulars. What was the principle of that decision? It is best expressed by Jervis, C. J., when following its authority in *Bonsey* v. *Wordsworth*, 18 C. B. at page 334, says: "But the Court of Exchequer in *Grimbley* v. *Aykroyd*, 1 Ex. 479 and *Wood* v. *Perry*, 3 Ex. 442, laid it down that where a tradesman has a bill against a party for any amount in which the items are *so connected together* that it appears that the dealing is *not intended to terminate with one contract, but to be continuous*, so that one item if not paid, shall be united with another and form *one continuous demand*, the whole together forms but one cause of action and cannot be divided."

The clearest exposition of the principle of Aykroyd's case will be found in a note by Sergeant Manning to *Dodd* v. *Wigley* at pages 114 and 115 of 7 C. B. Reports, and approved of by Jervis, C. J, in *Bonsey* v. *Wordsworth*, 18 C. B. pages 329 and 330. The learned Sergeant says:

"Where goods are ordered of a tradesman on the 1st of January, and distinct orders for other goods are given on the 2d, 3d, 4th 5th, &c., if from the previous dealings between the parties, or from general usage or otherwise, it is to be inferred that it was contemplated by the parties, that, in the event of the dealing continuing, the several items should be included in weekly, monthly, quarterly or yearly bills, the result of such an arrangement, and the legal position of the parties, seems to be this,—upon the delivery and acceptance of the first parcel of goods, delivered on the 1st of January, an entire contract is created, and a complete cause of action accrues, the tradesman being under no engagement to sell other goods, or to give credit beyond the price of the articles then delivered: when, on a subsequent day, other goods are delivered and accepted, a new contract arises, not simply a contract to pay for the goods then delivered, but a new entire contract by which the tradesman waives his existing right to payment for the goods delivered on the 1st January, and the purchaser agrees to pay for both parcels as upon one entire sale, *et sic toties quoties*. After the successive waiver and extinguishment of each preceding contract, the only subsisting contract and cause of action *ex contractu* will be the last. The distinction between a cause of action upon one entire contract and one cause of action of contract, appears to be too refined to be readily appreciable. In Aykroyd, in re. there appeared to be one entire *prevenient* governing contract, of which the respective deliveries were merely the execution—the *overt acts*."

In the case of *Kimpton* v. *Willey* 9 C. B. Maule, J., at page 723 is reported thus:

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"In Jagoe's County Court Practice, 52, I find an Irish case upon this subject, which is thus stated—"Splitting demands, prohibited by the Irish statutes in nearly the same words as in this section, has been a subject of judicial consideration in a case on appeal before Bushe, C. J., at the Dundalk Summer Assizes, 1833:—The plaintiff below brought a civil bill for use and occupation, to recover one gale of rent. There were two gales due at the time, which together amounted to a sum exceeding the jurisdiction, but separately were within it. The plaintiff below obtained a decree, against which the defendant appealed. For the appellant it was contended that the case came within the prohibitory words of the statute, as the two gales might clearly have been included in one declaration, and that it was vexatious to divide the claim. For the respondent it was argued, that the true test was, not whether the claim might be joined in the same declaration, and that a debt might by mutual arrangement be divided into several aliquot parts, and a promissory note taken for each part, which was frequently done for the purpose of making the summary remedy by civil bill attach, to recover each separately; which could not be the case while the demand was entire and undivided. Bushe, C. J., referred to the case of *Cairns* v. *Whelan*, Hudson & Brooke, 552, as bearing upon the question, and was at first inclined to consider the decree erroneous: but Mr. Hannan Amicus Curiæ, having referred him to the case of *The King* v. *The Sheriff of Herefordshire*, 1 B. & Ad. 672 (E. C. L. R. vol. 20), *the Chief Justice on the next day stated that that case was so much in point as to put an end to any further difficulty, and affirmed the decree.*"

The case of *R.* v. *Sheriff of Herefordshire*, 1 B. & Ad. 672, was as follows: The plaintiff, who was a carrier, had conveyed goods for the defendant, and the carriage amounted to £1 4s. In about a month afterwards he carried more goods for the defendant, and the carriage upon that occasion amounted to £1 4s. For these two sums respectively he commenced two suits in the County Court. It was urged that these two items must be considered as constituting but *one* entire debt or demand, and that the plaintiff had no right to split that demand in order to bring several suits. In delivering the judgment of the Court Lord Tenderden, C. J., says:

"I am of opinion that this case does not come within the rule of law which prohibits the splitting of a cause of action into several portions, for the purpose of commencing suits for each in an inferior court; to be so, the cause of action must be one and entire. But, in this case, the two items of £1 4s. each are perfectly distinct debts, the one having no connexion with the other; when the defendant incurred the debt stated

in the first item, the plaintiff might have sued for it in the county court, and his having incurred another and distinct debt with the plaintiff afterwards should not I think have the effect of depriving the plaintiff of his remedy in the county court for the first debt. And if he may still have that remedy for the first debt, he has it of course for the second also."

It will therefore be seen that the plaintiff had, according to the authority of Woodfall on Landlord and Tenant, 8th Edition, 1006, the right to bring several actions for as many instalments as fell in arrear. He could have done so monthly had he chosen. How is his right impaired by shewing leniency to his tenant? Mere delay in the prosecution of a right does not in the absence of statutory limitation form any answer by a debtor. What act appears to have been done by the plaintiff to curtail his several rights of action? It was urged that the several instalments uncollected formed *one* cause of action. When did that take place? Originally separate, when did the process of legal consolidation occur? From anything that the report discloses we fail to see. A closer examination of Aykroyd's case will shew that it proceeded on the principle that the parties from the nature of their dealing and the kind of business carried on must have impliedly agreed that the account should only be *one claim* so long as they chose to continue their business relations. As mentioned by Chief Justice Jervis, at page 334 of 18 Common Bench Reports, the parties did not intend their dealings "to terminate with one contract," but as he says it was "to be continuous, so that one item if not paid shall be united with another and form *one continuous demand.*" But the principle is so clearly explained by Sergeant Manning, sanctioned by such high authority as Chief Justice Jervis, that we think it may be accepted as law that by the course of dealing the tradesman had in Aykroyd's case, waived his right to payment of the goods delivered each day and the purchaser agreed to pay for all the parcels delivered "*as upon one sale.*" He says further: "After the successive waiver and extinguishment of *each preceding contract* the only subsisting contract and cause of action *ex contractu* will be *the last.*" He says further that "There appeared to be one entire *prevenient* governing contract, of which the respective deliveries were merely the execution—*the overt acts.*"

Can it be said that there is any similarity between a tradesman supplying goods to his customer on the one hand and the relation of landlord and tenant on the other? Does not the very statement of the case shew the difference? Both parties make the rent payable by monthly instalments? Is that not a reasonable way of arranging it in the case of a tenancy for a year? Would business men such as these parties appear to have been, understand that the debts were to become *one* so often as the

several instalments fell in arrear? Did the debts become fused so that the landlord could not have distrained for one instalment and sued for another instalment?

Had the parties either by their course of dealing raised the inference or expressly by words provided that the instalments as they fell in arrear should be considered *as one debt*, and not several debts; then undoubtedly the tenant's contention would be correct, but nothing of the kind appears. Nothing was done to change the relative position of the parties, and we repeat that mere delay in collecting the rent as it became due could not make the three instalments virtually *one* instalment, and that the same presumption does not arise in regard to a landlord's claim for rent as does in regard to a tradesman's bill contracted under such circumstances as appeared in Aykroyd's case. That case did not decide that a general claim of several items was necessarily one account, but that from the nature of the dealing between the parties to that case, it might fairly be inferred that *they* considered it one account and should be sued as such.

7. Section 68 of the said Act is hereby amended by adding the following sub-section thereto : R. S. O. c. 47, s. 68, amended.

In any action brought to recover a sum of money due on any promissory note or notes, such note or notes shall be filed with the clerk before judgment, unless otherwise ordered, or unless the loss of the note be shewn, or that it cannot for some other satisfactory reason be produced.

The 68th section of the Division Courts Act will, as amended by this section, now read thus: "The plaintiff shall enter with the Clerk a copy (and if necessary, copies) of his account, claim or demand in writing in detail (and in cases of tort, particulars of his demand), and each such copy shall be numbered according to the order in which the copies are entered, and thereupon a summons shall be issued, bearing the number of the account, claim or demand on the margin thereof, and corresponding in substance with such form as may be prescribed by the General Rules or Orders relating to Division Courts from time to time in force, according to the nature of the account, claim or demand, and on the trial of the cause no evidence shall be given by the plaintiff of any cause of action, except such as is contained in the account, claim or demand so entered.

In any action brought to recover a sum of money due on any promissory note or notes, such note or notes shall be filed with the Clerk before judgment, unless otherwise ordered, or unless the loss of the note be shewn, or that it cannot for some other satisfactory reason be produced."

The amendment effected by this section to section 68 of the Division Courts Act (Sinclair's D. C. Act, 90-93), will be found above in italics. It has evidently been made for the purpose of altering the law as declared in the case of *In re Drinkwater* v. *Clarridge*, 8 P. R. 504; Sinclair's D. C. Law 1885, page 52. It was there held that a Division Court Clerk was bound to enter a judgment on a special summons without production of the promissory note sued on. There is every reason for the filing of the note before judgment, so as to prevent its being improperly used again and as a protection to the defendant. On good grounds shewn an order could be obtained from the Judge dispensing with the necessity of filing the note or notes sued on. A common ground for making such an order is the

desire of the holder to proceed against parties to the note other than the party to the suit. The following is given as a form of order:

(Court and Cause.)

(*Date*, *&c.*)

Upon the application of the plaintiff, and upon reading the affidavit of , filed, it is ordered that the plaintiff be at liberty to have judgment entered in his favor in this action without his filing the note sued on herein, on his filing a true copy thereof with the Clerk of the Court.

JUDGE.

8. Section 74 of the said Act, is hereby amended by adding immediately after the word "brought," in the second line thereof, the words "or when the Bailiff has been suspended by order of the Judge." R. S. O. c. 47, s. 74, amended.

The 74th section of the Division Courts Act will, with this amendment, now read as follows:

"Where there is no Bailiff of the Court in which the action is brought, *or when the Bailiff has been suspended by order of the Judge*, or where any summons, execution, subpœna, process or other document is required to be served or executed elsewhere than in the Division in which the action is brought, it may, in the election of the party, be directed to be served and executed by the Bailiff of the Division in or near to which it is required to be executed, or by such other Bailiff or person as the Judge, or Clerk issuing the same, orders, and may, for that purpose, be transmitted by post, or otherwise, direct to such Bailiff or person, without being sent to or through the Clerk."

The amendment made by this section will be found above in italics. It was done to remedy the difficulty occasioned during the suspension of a Bailiff by reason of there being no officer to execute the process or other proceedings of the Court. See Sinclair's D. C. Act, pages 95 and 96; D. C. Law, 1884, 27.

R. S. O. c. 47, s. 95, amended.

9. Section 95 of the said Act is hereby amended by striking out the word "county" in the fourth line thereof, and substituting the word "province" therefor.

The 95th section of the D. C. Act will now read as follows:

"Any of the parties to a suit may obtain, from the Clerk of any Division Court in the County, a subpœna with or without a clause for the production of books, papers and writings, requiring any witness, resident within the *Province*, or served with the subpœna therein, to attend at a specified Court or place before the Judge, or any arbitrator appointed by him under the provision hereinafter contained; and the Clerk, when requested by any party to a suit, or his agent, shall give copies of such subpœna."—See Sinclair's D. C. Act, 123-125.

The object of the section is to allow a subpœna from a Division Court to run not only in the County in which it is issued but over the Province of Ontario. It will be observed that a subpœna need not necessarily be issued from the office in which the suit is entered, but it may be obtained from the Clerk of *any* Division Court in the County, that is the County in which the action is brought.

10. Section 98 of the said Act is hereby repealed, and the following is substituted therefor: R. S. O. c 47, s. 98, repealed.

98. Any person served with any such subpœna, who is resident in Ontario, but out of the county in which such Division Court is situate, shall be entitled to be paid witness fees and mileage according to the County Court tariff. Expenses to be paid witness out of county.

Instead of section 98 of the Division Courts Act, to be found at pages 127 and 128 of Sinclair's D. C. Act, the above section is substituted.

A person served with a subpœna from a Division Court and who resides in the Province of Ontario but not in the County in which the action is brought, will now be entitled to be paid his witness fees and mileage according to the scale of such fees in the County Court. It will be seen that there will hereafter be no such proceeding as issuing a subpœna from the High Court of Justice. A subpœna from a Division Court will have the same effect as a subpœna from the High Court has hitherto possessed.

It is not necessary for the purpose of the successful party's taxing witness fees and mileage against the opposite party that a subpœna should have issued and been served on a witness. Any witness, resident within the Province, who may at the request of a party to a suit voluntarily attend the trial as a witness without being subpœned, will be entitled to his proper fees as such witness on the Division Court scale only. Service of a subpœna is only necessary to *compel* the attendance of a witness but does not affect his right to witness fees, nor of the party who called him, if successful, and costs allowed, to tax them against his opponent: *Fox* v. *Toronto & Nipissing R'y Co.*, 7 P. R. 157. The same rule applies to a party to the cause: *Ib.*

As remarked in Archbold's Practice, 12th Edition, page 349:—"If you are not certain that your witnesses will attend at the trial *voluntarily* and give evidence, you must subpœna them."

A witness who, without being subpœned, came from some place outside the County in which the action was brought, would not be entitled to witness fees and mileage *on the County Court scale*, unless *subpœned* under the provisions of this section. Provision is made under the 19th section of this Act for the examination "of a witness who resides in a remote part of the Province and at a great distance from the place of trial." That, however, is

only permissive and does not affect the right of the successful party to tax witness fees against his opponent, whether the attendance of the witness was voluntary or compulsory.

Should a witness be brought from beyond the limits of Ontario, his witness fees could be taxed to the successful party, provided they did not exceed the costs of issuing a commission and taking his evidence thereunder according to the provisions of section 99 of the Division Courts Act.—Sinclair's D. C. Act, page 128 and following pages: *Armour* v. *Walker*, 25 Ch. D. 673.

Upon an application for a commission to take the evidence of a witness who is abroad, the Judge ought to be satisfied that the application is made *bona fide*, and that the claim in support of which the evidence is desired is one which the Court ought to try, but it ought not to go any further into the merits of the claim: *In re Boyse*, *Crofton* v. *Crofton*, 20 Ch. D. 760.

In a case in which a claim was made under very suspicious circumstances and the Court was of opinion that a person, resident abroad, whose evidence was desired in support of it, ought to be subjected to a drastic cross-examination; it was held that a commission ought not to be issued to a foreign Court for the examination of the witness abroad, because it appeared that under the procedure of that Court he would not be cross-examined in the ordinary way.—*Ib.*

A commission should not be issued to an interested witness if it appear that he is making application for the commission to avoid cross-examination at the trial: *Berdan* v. *Greenwood*, 20 Ch. D. 764, explained in *Langen* v. *Tate*, 24 Ch. D. 522. The last case also decides that where it appears from the material before the Court on application for the commission that the proposed evidence is not material, it will be refused.

Where a single commissioner is appointed to take evidence abroad the commission should authorize him to administer the oath to himself: *Wilson* v. *DeCoulon*, 22 Ch. D. 841.

In Division Court suits the commission issues from the County Court, Sinclair's D. C. Act 128, and can only issue on the conditions prescribed by the 100th section of the Division Courts Act: Sinclair's D. C. Act, 132.

If a case is made out that it is necessary for the purposes of justice that witnesses resident abroad should be examined in our Courts, a commission will not be granted: *Armour* v. *Walker*, 25 Ch. D. 673.

As a general rule a commission will not be issued to take the evidence of experts; *Russell* v. *G. W. Ry. Co.*, 3 U. C. L. J. 116; *Bingham* v. *Henry*, 19 L. J. N. S. 223; See, also, *Mair* v. *Anderson*, 11 U. C. R. 160; *Attorney General* v. *Gooderham*, 20 L. J. N. S. 175, 10 P. R. 259 S. C.

Where secondary evidence is received by the commissioner without objection it cannot be excepted to at the trial. The proper course in such cases is to except to the reception of any improper evidence, and if received

to have the objection to its reception noted in the notes of the witness' testimony. Then advantage can be taken of it, not otherwise: *Robinson* v. *Davies*, 5 Q. B. D. 26.

Where it is sought to have a material witness examined abroad, and the nature of the case is such that it is important that he should be examined here, the party asking to have him examined abroad must shew clearly that he cannot bring the witness to this country to be examined at the trial: *Lawson* v. *Vacuum Brake Co.*, 27 Ch. D. 137.

A commission will issue to examine a witness notwithstanding that his character for veracity is impeached. The proper course in such a case is to call witnesses at the trial for that purpose. *Nordheimer* v. *McKillop*, 10 P. R. 246.

A commission should not be issued in a Division Court case to take evidence out of the jurisdiction until after the defendant has put in his defence, nor then unless the applicant shews by affidavit what evidence he expects to get from the witness: *Smith* v. *Greey*, 10 P. R. 531.

If evidence is taken under commission and not used by either party, the costs of taking it will be disallowed: *Dominion &c. Co.* v. *Stinson*, 9 P. R. 175.

Where an order was made for a commissioner to examine one M. *viva voce*, and other witnesses on interrogatories, it was held that the commission could not issue to examine M. only without amending the order: *Smith* v. *Babcock*, 9 P. R. 175.

If a party attend on a commission after the time for its return has expired he waives any right to object to the delay: *Darling* v. *Darling*, 9 P. R. 560.

A second commission may issue to examine a witness where he admits he did not fully disclose the facts on the first commission: *Rogers* v. *Manning*, 8 P. R. 2.

In some cases involving intricate questions of fact, the evidence will be ordered to be taken *viva voce*: *Watson* v. *McDonald*, 8 P. R. 354.

On an application for a foreign commission to examine a witness who is travelling it should be shewn that he will remain at the place to which the commission is directed a sufficient time to allow of its due execution: *Singer* v. *Williams Manufacturing Co.*, 8 P. R. 483.

As to the general rules on which a commission will be ordered and the Forms applicable thereto, the reader is referred to Sinclair's D. C. Act, 128-133; Chitty's Forms, 11th Edition, 284-300; Archbold's Practice. Rob. & Joseph's Digest, 1317-1325; Ontario Digest, (1884) 244.

The following is the Tariff of Fees to Witnesses in the County Court, and to which witnesses beyond the limits of the County in which a Division Court action is brought, but within the Province, are entitled *if subpœned* under this section:—

Allowance to Witnesses in County Courts.

[See 34 U. C. R., pp. 289, 290.]

To Witnesses residing within three miles of the Court House, per diem	$1 00
To Witnesses residing over three miles from the Court House	1 25
Barristers and Attorneys, Physicians and Surgeons, when called upon to give evidence in consequence of any professional service rendered by them, or to give professional opinions, per diem	4 00
Engineers and Surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem	4 00

If the Witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause, they will be entitled to a proportionate part in each cause only.

The travelling expenses of Witnesses over ten miles shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile, one way.....

The writer sees no reason why a witness residing out of the County, and who comes at the request of a party and without the compulsion of a subpœna, to attend the trial of an action in the Division Court, should not be entitled to have his witness fees allowed him on the County Court scale, and the same by the party at whose instance he came, taxed against the opposite party, just the same as if he had been subpœned. The answer in the negative is to be found in the narrow language of the section.

Memorandum on garnishee summons.

11. In all cases under the provisions of sections 130 and 133 of the said Act where the debt sought to be garnished is for wages or salary, there shall be upon, or annexed to the summons served on the garnishee, a memorandum shewing the residence of the primary debtor and the nature of his occupation in the service of the said garnishee at the time of the issuing of the said summons (if then in such service), and also stating whether the debt alleged or adjudged to be due by the primary debtor to the primary creditor was or was not incurred for board or lodging, and in the absence of such last mentioned statement the said debt may be presumed by the garnishee not to have been incurred for board or lodging.

This section makes provision for two classes of cases:

(1) Where a judgment has been recovered, and in which garnishment proceedings are allowed under section 130 of the Division Courts Act: Sinclair's D. C. Act 154, and

(2) Where judgment has not been obtained but proceedings are taken simultaneously against the primary debtor and the garnishee, with a view of having judgment against the former for the amount of the debt due the primary creditor, and against the garnishee for anything found to be due by him to the primary debtor: Sinclair's D. C. Act 156. The latter is the most usual proceeding of garnishment in the Division Courts.

The section under consideration appears to have been framed chiefly in the interests of the garnishee. It proposes to provide for cases where the debt sought to be garnished is for wages or salary.

We propose here to give a short history of legislation on that subject insofar as the Division Court proceeding of garnishment is concerned.

At first wages or salary was not exempt from garnishment proceedings. Any amount of wages or any balance of salary overdue, no matter how small, was subject to garnishment process. It did not apply then, nor does

it now, to money as wages or salary which had not become due: Sinclair's D. C. Law, 1884, pages 3, 142, 146, and the cases there cited; but only where the sum garnished had become a past due debt: *Shanley* v. *Moore*, 9 U. C. L. J. 264; *Hall* v. *Pritchett*, 3 Q. B. D. 215; *Gordon* v. *Jennings*, 9 Q. B. D. 45; *Booth* v. *Trail*, 12 Q. B. D. 8.

On the 24th March, 1874, an Act was passed to amend the law relating to the attachment of debts as respects the wages and salaries of mechanics and others, providing that any debt due or accruing to a mechanic, workman, labourer, servant, clerk or employee, for or in respect of his wages or salary, should after the first day of October then next, be liable to seizure or attachment, under the provisions of the Common Law Procedure Act, or of the Act passed in the 32nd year of Her Majesty's reign, intituled "An Act to amend the Acts respecting Division Courts," or under the provisions of any other Act relating to the attachment or garnishment of debts, unless such debts should exceed the sum of $25, and then only to the extent of such excess; but it was by the same statute enacted that the said Act should not affect or impair the right or remedies of any creditor whose debt had been theretofore contracted or should be contracted before the first day of October, 1874.

These provisions will now be found as sections 125 and 126 of the Division Courts Act: Sinclair's D. C. Act, 152.

So the law remained until the year 1877, when these provisions were placed in the Revised Statutes of Ontario as the above named sections of the Division Courts Act. The provision in the original Exemption Act of 1874, (37 Victoria, Chapter 13), as making the exemption not only applicable to Division Court proceedings, but to all garnishment proceedings in all other Courts, or under any other Act relating to attachment or garnishment of debts, was in the revision of the statutes not confined to the Division Court alone, but was, as in the original Act, made applicable to other Courts, R. S. O., pages 507 and 679.

So again the law remained until the year 1884 when an exception was engrafted on these exemption clauses, but insofar only as Division Court proceedings were concerned, providing that in any case where the debt had been contracted for board or lodging, and where in the opinion of the Judge the exemption of $25 was not actually necessary for the support and maintenance of the debtor's family, the rights or remedies of any creditor therefor should be unaffected by the exemption of $25: 47 Victoria, Chapter 9, section 1; Sinclair's D. C. Law, 1884, pages 1-16. In other Courts, therefore, garnishment proceedings would be unaffected by this enactment.

The section of the present Act now under discussion does not affect the rights of parties as they previously existed, but deals with procedure in garnishment proceedings only.

The following appear to be pre-requisites of summonses issued under

either the 130th or 133rd section of the Division Courts Act, where the debt sought to be garnished is wages or salary:

(1) That there shall be upon or annexed to the summons served on the garnishee, but not necessarily on the one served on the primary debtor, a memorandum shewing the residence of the primary debtor and the nature of his occupation in the service of the garnishee at the time of the issuing of such summons, if there is such service.

(2) Also, stating therein, whether the debt alleged or adjudged to be due by the primary debtor to the primary creditor, was or was not incurred for board or lodging.

In the absence of such last mentioned statement the debt sought to be garnished may be presumed by the garnishee not to have been incurred for board or lodging.

This section evidently has for its object mainly the relief of railway and other corporations and large employers of labour. Hitherto they have been obliged to ascertain through the evidence at the trial whether, on their being garnished, they should pay the amount due by them less the exemption or independently of it. Now the *onus* is cast on the creditor, of not only shewing whether his debt is for board or lodging, but also the residence of the primary debtor and the nature of his occupation if in the service of the garnishee, so that the garnishee may know what to do, and not incur the trouble and expense of ascertaining it at the sittings of the Court. If the primary creditor does not shew *affirmatively* that his claim was incurred for board or lodging, then the garnishee is to presume that it was *not* so incurred, in which case he will only be called on to pay into Court the amount due, less the $25 exemption. The following may be used as a form of memorandum under this section, to be endorsed upon or annexed to the summons served on the garnishee:

"Memorandum under "the Division Courts Amendment Act, 1886," section 11;—

(1) The primary debtor resides at the City of Hamilton in the Province of Ontario, and his occupation in the service of the garnishees is that of an engine-driver (*or as the case may be*) on the railway of the garnishees (the Grand Trunk Railway Company of Canada), and is occupied as such on said railway between the Cities of Toronto and Hamilton (*or as the case may be*).

(2) "The debt alleged (*or if after judgment* "adjudged") to be due by the primary debtor to the primary creditor was (*or* "was not") incurred for board or lodging."

If the primary debtor is not in the service of the garnishee, of course nothing need be said of his occupation, for the object evidently is to save any mistakes where there may be several men of the same name in the employ of the garnishee, and to facilitate the identification of the primary debtor.

The above memorandum must in all cases, whether judgment has been recovered or not, *where the debt sought to be garnished is for wages or salary, but not in other cases*, be printed or annexed to the summons served on the garnishee or garnishees. It had better be printed on the summons. If the memorandum does not state that the debt was incurred for board or lodging the garnishee may presume that it was not so incurred. If not so incurred there would be no exemption: Sinclair's D. C. Law, 1884, page 1. The object is to give such information to the garnishee as will enable him to say whether or not the primary debtor is entitled to the $25 exemption mentioned in section 125 of the Division Courts Act: Sinclair's D. C. Act, 152.

Under the 145th section of the Division Courts Act, (Sinclair's D. C. Act, 164) the Judge in garnishment proceedings may "prescribe and devise forms for any proceeding."

12. Sub-section 2 of section 136 of the said Act is hereby repealed, and the following substituted therefor : R. S. O. c. 47, s. 36, sub-s. 2, repealed.

(2) Any primary debtor or garnishee who desires to set up any statutory or other defence or any set-off or to admit his liability in whole or in part for the amount claimed in any such action shall file with the Clerk the particulars of such defence or set-off, or an admission of the amount due or owing by the primary debtor or the garnishee, as the case may be, within eight days after service on him of the summons, and the Clerk shall forthwith send by mail to each of the said parties to the action a copy of such defence, set-off or admission, and the primary creditor may file with the Clerk a notice that he admits the defence or set-off or accepts the admission of liability as correct; a copy of such notice shall be sent by the Clerk by mail, forthwith to such garnishee, and in the absence of any notice of defence or set-off, from any primary debtor or garnishee, the Judge may, in his discretion, give judgment against such primary debtor or garnishee; and in the event of the primary creditor failing to file a notice admitting or rejecting such defence, set-off or admission of liability, the garnishee shall not be bound to attend at the trial, and the sum admitted to be due or owing by the garnishee, shall be taken to be the correct amount of his liability, unless the Judge shall otherwise order, in which latter case the garnishee shall be notified by the Clerk and shall have an opportunity of attending Defences in garnishee proceedings.

at a subsequent date and being heard before judgment is given against him.

Costs. (3) The costs of all notices required to be given under this section, shall be costs in the cause, and in no case shall be payable by the garnishee, unless specially ordered by the Judge.

The sub-section of section 136 of the Division Courts Act that is hereby repealed will be found at pages 158 and 159 of Sinclair's D. C. Act. It was in the following language :—" Notice of any Statutory defence shall be given to the primary creditor at the time and in the manner required in respect to such notices in ordinary cases." The first sub-section of section 136 is in these words :—

" In all cases under this Act, and whether the claim of the primary creditor is or is not a judgment, the primary debtor, the garnishee, and all other parties in any way interested, in or to be affected by, the proceeding, shall be entitled to set up any defence, as between the primary creditor and the primary debtor, which the latter would be entitled to set up in an ordinary suit, and also any such defence as between the garnishee and the primary debtor, and may also show any other just cause why the debt sought to be garnished should not be paid over or applied in or towards the satisfaction of the claim of the primary creditor."

The latter, with the present 12th section of this Act, will now constitute the 136th section of the Division Courts Act.

It will be observed that the section of this Amendment Act now under consideration is much more comprehensive than the repealed sub-section. No notice of any kind was necessary to be given under the former law, except that where a Statutory defence was necessary it had to be given to the primary creditor. Now, both primary debtor and garnishee must set up " any Statutory or *other* defence or any set.off." But it must be observed that this provision applies to garnishment proceedings *only*. A discussion of the subject of Statutory defence will be found at pages 158 and 159 of Sinclair's D. C. Act. The most familiar Statutory defence is the Statute of Limitations. It was at one time considered that a judgment by default should not be set aside to allow a defendant to plead that Statute : *Willet* v. *Atterton*, 1 W. Black. 35. It is said at page 988 of Archbold's Practice, 12th Edition, that " a plea of the Statute of Limitations is now considered a plea to the merits." In support of this view see *Rucker* v. *Hannay*, 3 T. R. 124 ; *Maddoks* v. *Holmes*, 1 B. & P. 228. But see *Brigham* v. *Smith*, 3 Chan. Chambers R. 313.

In an action for fraudulent misrepresentation the Statute of Limitations begins to run from the time of the misrepresentation, not from its discovery : *Dickson* v. *Jarvis*, 5 O. S. 694.

A Solicitor's bill of costs for services rendered in obtaining judgment for his client will be barred after six years from the entry of judgment: *Lizars* v. *Dawson*, 32 U. C. R. 237.

Where a cause of action accrues in the lifetime of the debtor, the statute begins to run against his estate, notwithstanding there is no executor or administrator: but where the cause of action does not accrue until after his death, then the time does not begin to run until there is a personal representative who can sue and be sued: *Grant* v. *McDonald*, 8 Grant 468.

On a purchase of land, the vendee gave his note, payable in a year with interest, for part of the purchase money. The vendor died before the note came due, and administration was not taken out for eleven years. In a suit commenced a year afterwards by the administrators, it was held that as the cause of action did not arise until there was some person to sue, interest was recoverable for the whole period from the date of the note: *Stevenson* v. *Hodder*, 15 Grant 570.

In was held in *Wright* v. *Merriam*, 6 O. S. 167, under the then system of pleading, that in an action by an administrator, a replication of a promise to the intestate in answer to a plea of the Statute, was not supported by proof of a promise to the administrator: See *Stewart* v. *Garrett*, 34 Alb. L. J. 279; *Parker* v. *Remington*, 34 Alb. L. J. 283.

To take a case out of the Statute by a subsequent promise to pay, slight evidence is sufficient, but the recognition of liability must be unequivocal, or the promise must be unconditional, or the condition performed: *Carpenter* v. *Vanderlip*, E. T. 3 Vict.; *Spalding* v. *Parker*, 3 U. C. R. 66; *Grantham* v. *Powell*, 6 U. C. R. 494; *Meyerhoff* v. *Froehlich*, 3 C. P. D. 333, 4 C. P. D. 63; *Cowing* v. *Vincent*, 29 U. C. R. 427; *Smith* v. *Burn*, 30 C. P. 630; *Cameron* v. *Campbell*, 7 App. R. 361; *Cook* v. *Grant*, 32 C. P. 511; *Re Ross*, 29 Grant, 385; *Re Kirkpatrick*, *Kirkpatrick* v. *Stevenson*, 3 Ont. R. 361.

An admission by an executor that a note barred by the Statute is due, coupled with a statement that it could not be paid for want of assets, and that if there were assets it should be paid, is a conditional promise merely, and not sufficient: *Lampman* v. *Davis*, 1 U. C. R. 179. See also *McCormick* v. *Berzey*, 1 U. C. R. 388. Such a promise must now be in writing: R. S. O., Chapter 117.

An account stated by an executor of a debt due by his testator, which had never before such accounting been ascertained or determined, was held sufficient to charge the executor as for a substantive debt, without any express promise to pay: *Watkins* v. *Washburn*, 2 U. C. R. 291.

A promise to pay to an administrator before letters of administration granted, would seem to be insufficient: *Beard* v. *Ketchum*, 5 U. C. R. 114.

Formerly the latter items of a running account drew the others with them, so as to defeat the operation of the Statute: *Hamilton* v. *Mathews*,

5 U. C. R. 148; *King's College* v. *McDougall*, 5 U. C. R. 315, but not now; R. S. O., chapter 61, section 2.

A promise to pay by one of several joint and several makers of a note would formerly take the case out of the Statute: *Sifton* v. *McCabe*, 6 U. C. R. 394, but not now: R. S. O., chapter 117, section 2.

The promise to pay must not be uncertain: *Dougall* v. *Cline*, 6 U. C. R. 546.

Where part of plaintiff's own demands stated in his particulars are barred by the Statute, he has a right to place against these the items of set-off appearing in his particulars to be beyond six years: *Ford* v. *Spafford*, 8 U. C. R. 17.

A payment to take a case out of the Statute must be clear and distinct: *Notman* v. *Crooks*, 10 U. C. R. 105.

A letter in these words was held not to imply a promise to pay so as to get over the effect of the Statute: "I received your letter dated January 31. I am sorry to say I cannot do anything for you at present, but shall remember you as soon as possible:" *Gemmell* v. *Colton*, 6 C. P. 57.

A promise given by one of several parties to pay his share of the debts of the firm who offered as a composition one-third of the debt (there having been three members of the firm), is not sufficient to charge him in an action against the firm: *Barnes* v. *Metcalf*, 17 U. C. R. 388.

Promising to have the amount placed to plaintiff's credit is a sufficient acknowledgment within the Statute:—*Jones* v. *Brown*, 9 C. P. 201.

An acknowledgment of the debt raises an implied promise to pay: *Lyon* v. *Tiffany*, 16 C. P. 197.

When the Stamp Act was in force it was held that a promissory note not properly stamped could not be used to take a case out of the Statute of Limitations: *McKay* v. *Grinley*, 30 U. C. R. 54.

A settlement and statement of accounts appears to create a new cause of action within the Statute: *House* v. *House*, 24 C. P. 526.

Payments should, in the absence of specific directions by the creditor, be applied on the earlier items of an account, not barred at the time of payment, but before suit had subsequently become so: *Cathcart* v. *Haggart*, 37 U. C. R. 47.

In order to render the crediting of an account against the plaintiff evidence of payment by him of so much on an account due the plaintiff so as to take the case out of the Statute, it must appear that the defendant clearly assented to its being considered a payment: *Ball* v. *Parker*, 39 U. C. R. 488, 1 App. R. 593.

An executor *de son tort* cannot, by giving a confession of judgment or making payment on account of a debt, or by any other act of his, give a new start to the Statute as against the rightful administrator, or other parties beneficially interested in the estate: *Grant* v. *McDonald*, 8 Grant 468.

Mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt: *Emes* v. *Emes*, 11 Grant, 325.

Where a debt the remedy for which was barred by the Statute of Limitations, was acknowledged by the debtor and judgment was recovered therefor, a voluntary settlement made before such acknowledgment and before the remedy was barred, was held void as against an execution on the judgment: *Irwin* v. *Freeman*, 13 Grant, 465.

Where the mortgagor is in possession, a mortgage may be presumed satisfied after twenty years from the payment of the mortgage money, *Doe McGregor* v. *Hawke*, 5 O. S. 496.

Trust moneys are not subject to the operation of the Statute: *Ruggles* v. *Beikie*, 2 O. S. 370; *Loring* v. *Loring*, 12 Grant, 374; *Ford* v. *Allen*, 15 Grant 565; *Scatcherd* v. *Kiely*, 22 Grant 8: *Tiffany* v. *Thompson*, 9 Grant 244: *McFadden* v. *Stewart*, 11 Grant, 272: *Smith* v. *Redford*, 19 Grant 274; *Gunn* v. *Adams*, 8 L. J. N. S. 211; *Trust and Loan Co.* v. *Clarke*, 3 App. R. 429; *Cameron* v. *Campbell*, 27 Grant 307; *Re Goff*, 8 P. R. 92.

A cause of action on a covenant to indemnify only accrues on payment under the indemnity and not when made: *Ives* v. *Ives*, T. T. 3 and 4 Vict.

The Court has authority to prevent a Solicitor pleading the Statute to a just claim: *Dougall* v. *Cline*, 6 U. C. R. 546.

If a debt is barred in a foreign country, the defendant must shew it: *Fowler* v. *Vail*, 27 C. P. 417.

The Statute of Limitations does not bar the claim of the executor against the estate of the testator: *Emes* v. *Emes*, 11 Grant 325.

All exceptions and distinctions in favour of a trustee have been abolished; R. S. O., chapter 61, section 3; *Low* v. *Morrison*, 14 Grant 192; *Pardo* v. *Bingham*, L. R. 4 Ch. 735.

When the Statute once begins to run, it continues to run notwithstanding any subsequent disability: *Dixon* v. *Grant*, 3 O. S. 511.

The Statute of Limitations is a good defence to a claim for partnership accounts: *Noyes* v. *Crawley*, 10 Ch. D. 31.

In an action for malicious persecution the cause of action commences to run from the plaintiff's acquittal of the offence charged: *Crandall* v. *Crandall*, 30 C. P. 497.

As to appropriation of money operating as a payment to save the Statute: See *St. John* v. *Rykert*, 10 Sup. R. 278.

Where an English Companies' Act makes calls for shares a specialty debt, it does not thereby become a specialty debt in this Province: *Barned's Banking Co. (Limited)* v. *Reynolds*, 36 U. C. R. 256.

An action on a covenant in a mortgage is only barred after twenty years: *Allan* v. *McTavish*, 2 App. R. 278; *McDonald* v. *Elliott*, 12 Ont. R.

98; but see *Sutton* v. *Sutton*, 22 Ch. D. 511; *In re Powers, Lindsell* v. *Phillips*, 30 Ch. D. 291; *Fearnside* v. *Flint*, 22 Ch. D. 579.

An action on a judgment of a Court of record may be brought within twenty years: *Boice* v. *O'Loane*, 3 App. R. 167; see *Caspar* v. *Keachie*, 41 U. C. R. 599.

An infant has six years after attaining his majority to bring an action for work and labor performed by him during his infancy: *Taylor* v. *Parnell*, 43 U. C. R. 239.

Where a limitation as to time is specially placed in a Statute to the bringing of an action it supersedes any general limitation: *Cairns* v. *Water Commissioners of Ottawa*, 25 C. P. 551; *Trotter* v. *Corporation of Toronto*, 29 C. P. 365; *Attorney-General* v. *Walker*, 3 App. R. 195; *Sullivan* v. *Corporation of Barrie*, 45 U. C. R. 12; *Watson* v. *Lindsay*, 27 Grant, 253.

An action against a Clerk of a Municipality for omitting names from the Collector's Roll is not limited to two years under R. S. O., chapter 61, section 1: *Corporation of Peterborough* v. *Edwards*, 31 C. P. 231.

A bill of exchange fell due on the 1st of December, 1875, and an action commenced thereon on the 1st of December, 1881, was held in time: *Edgar* v. *McGee*, 1 Ont. R. 287.

A married woman was notwithstanding R. S. O., chapter 125, section 20, held entitled to bring an action in respect of her separate property within six years after becoming discovert: *Carroll* v. *Fitzgerald*, 5 App. R. 322. [It is submitted that this cannot be considered law since "The Married Women's Property Act 1884," *Lowe* v. *Fox*, 15 Q. B. D. 667.]

A settlement of partnership accounts cannot be opened up after six years: *Cotton* v. *Mitchell*, 3 Ont. R. 421.

As to the effect of letters written by the president of a company after the original claim against it had been barred: See *Shanly* v. *Grand Junction Ry. Co.*, 4 Ont. R. 156.

The following letter was held a sufficient acknowledgment in writing to take the case out of the Statute of Limitations:—"I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week." *Lee* v. *Wilmot*, L. R. 1 Ex. 364.

The following letters were also held sufficient:—"I shall be obliged to you to send in your account, made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders till this be done." Again, "You have not answered my note. I again beg of you to send in your account, as I particularly require it in the course of this week": *Quincey* v. *Sharpe*, 1 Ex. D. 72.

The defendant, whose debt was barred by the Statute of Limitations, wrote to the plaintiff within six years before action the following letter: "I return to Shepperton about Easter. If you send me there the particulars of your account with vouchers, I shall have it examined and cheque

sent to you for the amount due; but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim." It was held that the debt was revived: *Skeet* v. *Lindsay*, 2 Ex. D. 314.

A letter written "without prejudice" cannot be used to take a case out of the Statute of Limitations: *In re River Steamer Company, Mitchell's Claim*, L. R. 6 Ch. 822; See *Vardon* v. *Vardon*, 6 O. R. 719; *Omnium Securities Co.* v. *Richardson*, 7 O. R. 182.

An executor may, in his discretion, pay a debt barred by the Statute of Limitations: *Lowis* v. *Rumney*, L. R. 4 Eq. 451. He may waive the Statute. *Alston* v. *Trollope*, L. R. 2 Eq. 205.

In order to keep a debt alive in the Division Court, proceedings must be taken under Rule No 127: See, also, *Manby* v. *Manby*, 3 Ch. D. 101.

A claim may be barred under the law of another country where the debt was incurred, yet not under our law: *Harris* v. *Quine*, L. R. 4 Q. B. 653: See *Lizars* v. *Dawson*, 32 U. R. 237.

Where one man lends another money by cheque on his banker, the Statute commences to run from payment of the cheque by the banker, not from the time when drawn: *Garden* v. *Bruce*, L. R. 3 C. P. 300.

A bond was given in India where the debt was barred on it in three years, yet it was held that in England it was a specialty debt and could be sued upon within twenty years: *Alliance Bank of Simla* v. *Carey*, 5 C.P.D. 429.

It was held that the following letter was a sufficient acknowledgment of a debt under the Statute of Limitations:—"The old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps in the meantime you will let your clerk send me an account of how it stands."—*Chasemore* v. *Turner*, L. R. 10 Q. B. 500.

Goods having been bailed by the plaintiffs to the defendant for safe custody, the defendant wrongfully sold them; and the plaintiffs, more than six years after the date of the sale, being ignorant of the fact of its having taken place, demanded a return of the goods, which the defendant refused, it was held in an action of detinue for the goods that the Statute of Limitations ran from the date of the demand and refusal, and not from that of the sale, inasmuch as the plaintiffs, in such a case, though entitled if they had discovered the sale to sue immediately for a conversion of the goods, were also entitled to elect to sue upon the breach of the bailee's duty in the ordinary cause by the refusal to deliver up on request. So also where an action of detinue is founded upon a bare taking and withholding of the property of another, without any circumstances to shew a trust for the owner, or to found an option to sue either for the wrong or for the breach of the original terms of deposit; the Statute would run from the time at

which the property was first wrongfully dealt with: *Wilkinson* v. *Verity*, L. R. 6 C. P. 206.

Where a testator being at the time of his death in 1857, indebted to B., on simple contract, gave by his will his real and personal estate to his wife, for life, and appointed J. and E. executors. The will was not proved for many years, but the widow took possession of all the property and paid interest on the debt to February, 1864. In September, 1870, the will was proved and then B. filed his bill on behalf of himself and other creditors against the widow and the executors. It was held that the claim was barred by the Statute of Limitations: *Boatwright* v. *Boatwright*, L. R. 17 Eq. 71.

In *Wilby* v. *Elgee*, L. R. 10 C. P. 497, the letters of the defendant produced in evidence were held a sufficient acknowledgment of the debt.

Where there is a discontinuance of a partnership without any dissolution or winding up the affairs, six years do not form a bar to an action to dissolve the partnership and take the accounts: *Miller* v. *Miller*, L. R. 8 Eq. 499. But see *Noyes* v. *Crawley*, 10 Ch. D. 31.

A compulsory payment of interest does not save the operation of the Statute: *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493.

Where there is a conditional promise to pay, it must appear that the condition is performed to entitle the plaintiff to recover: *Meyerhoff* v. *Froehlich*, 3 C. P. D. 333, 4 C. P. D. 63.

Where a promissory note was made payable three months after demand, payment of interest was held evidence of a demand and from which time the Statute would run: *Brown* v. *Rutherford*, 14 Ch. D. 687.

One L. in 1846, promised to pay three months after date to B., or to C. his wife, the sum of £500. B. died in 1863, leaving C. surviving. There was an indorsement on the note in L., the maker's handwriting of his name and the year 1866. C. died in 1868, and it was held that it was not intended to make a new note and that there was a sufficient acknowledgment to exclude the Statute of Limitations: *Bourdin* v. *Greenwood*, L. R. 13 Eq. 281.

The following was held not to be a sufficient acknowledgment:—"I thank you for your very kind intentions to give up the rent of T. B. next Christmas, but I am happy to say at that time both principal and interest will have been paid in full." *Green* v. *Humphreys*, 26 Ch. D. 474.

In an action for conversion the Statute of Limitations runs from demand and refusal: *Spackman* v. *Foster*, 11 Q. B. D. 99.

In an action to recover by way of damages, money lost by the fraudulent representations of the defendant, a reply to a defence of the Statute of Limitations that the plaintiff did not discover and had not reasonable means of discovering the fraud within six years before action and that the existence of such fraud was fraudulently concealed by the defendant until within such six years was held good: *Gibbs* v. *Guild*, 8 Q. B. D. 296, 9 Q. B. D. 59.

It will be observed that the section has application not only to any

Statutory defence which the primary debtor or garnishee may have, but also to *any other* defence or set-off. This is new practice in Division Court garnishment proceedings, but it *must* be observed because the Statute so declares it. Set-off is a Statutory defence, so also is Counter-claim. It is therefore compulsory now for either a primary debtor or garnishee to comply with the provisions of this section. The writer has tried in the following paragraphs to epitomize the rights and duties of the primary debtor and garnishee, as well as point out to the primary creditor and Division Court Clerk their respective duties.

If *either* the primary debtor or the garnishee has any defence, or if any admissions should properly be made by either one, he should do so in the following manner :—

(1) To file with the Clerk of the Court *the particulars* of any defence, statutory or otherwise, within eight days after service of the summons on him. The time will be calculated *exclusively* of the day of service.

For example, if service should be made on the 1st of any month, the notice should be filed with the Clerk not later than the 9th of the same month. If the notice was merely mailed to him that day, but not received until after the expiration of the eight days, it would be too late. Unlike the acceptance of an offer to contract, where the mailing of a letter of unconditional acceptance concludes the contract, the scope and language of this Statute would render such a rule of law inapplicable.

Sundays are included in the eight days: Sinclair's D. C. Law, 1885, pages 21, 109 and authorities there cited. This section imposes a greater obligation on the primary debtor than on a defendant in the case of a special summons. In the latter case the "particulars" of defence need not be given where it is not of a Statutory nature, but under this section such particulars are necessary.

(2) If either the primary debtor or garnishee has no defence to the action, or only to a part thereof, then a notice should be given admitting the whole or such part, and a denial of the balance of the claim, with "particulars" of the defence which either may have thereto.

(3) On the Clerk's receiving the notice under this section he must *forthwith* (Sinclair's D. C. Law, 1885, pages 19 and 20) send by mail to each of the parties to the action, a copy of such defence, set-off or admission.

As will be seen from the authorities cited in the work just quoted the Clerk and his sureties would be liable for any default of the Clerk, but any party to the suit would not be prejudiced by the omission. The notice need not be sent by the Clerk to the person giving it, but only to the *other* parties to the suit.

(4) The primary Creditor may file with the Clerk a notice that he admits the defence or set-off. No time is here prescribed for this notice

being filed, but it should be within a reasonable time. The Clerk is to send a copy of such notice by mail to the garnishee forthwith.

(5) In the absence of any notice of defence or set-off from any primary debtor or garnishee, the Judge may in his discretion give judgment against the primary debtor or garnishee.

It will be observed that it is not compulsory upon the Judge to act upon the default of the primary debtor, but if the proceedings were regular and the Judge was satisfied that no injustice would be done by it, he could give judgment by default.

Three things occur to the writer in this connection:

First, that in the absence of notice, or if notice given too late, no express provision is made for allowing the primary debtor in to defend as is the case under the 80th section of the Division Courts Act, (Sinclair's D. C. Act 103), but probably section 145 of the Division Courts Act (Sinclair's D. C. Act 154), makes provision for that. *Second*, that the effect of the judgment by default is not declared as in other parts of Division Court legislation but is left in doubt: Sinclair's D. C. Act 1880, 31 and following pages and Sinclair's D. C. Law 1885, pages 1, 22, 23 and 227: *Clarke* v. *Macdonald*, 4 Ont. 310; *Chadwick* v. *Ball*, 14 Q. B. D. 855; *Re Knight* v. *Medora*, 11 Ont. R. 138. The judgment would probably have the same effect as in other garnishment proceedings. *Third*, what course the Judge is to pursue in the event of exercising his dicretion *not* to give judgment by default against the primary debtor, or what position the primary creditor may be in in that case. It is submitted that all parties would in such an event be relegated to the rights they would have possessed had the Statute not been passed.

If the primary creditor fails to file a notice admitting or rejecting the defence, set-off or admission of liability put in, the garnishee shall not be bound to attend at the trial and the sum admitted to be due or owing by the garnishee (if such admission has been made) shall be taken to be the correct amount of his liability unless the Judge otherwise orders. If the Judge does so order, then the Clerk shall notify the garnishee, who shall have an opportunity of attending at a subsequent date and being heard before judgment is given against him.

If such opportunity were not given, any proceedings in the absence of it would be void: Sinclair's D. C. Act 31 and the cases at page 221 of Sinclair's D. C. Law, 1885; even though the party were a pauper: *Tucker* v. *Collinson*, 16 Q. B. D. 562.

The fact that a judgment is more than six years old, without revival, does not appear to bar a garnishment proceeding: *Fellowes* v. *Thornton*, 14 Q. B. D. 335.

The debt, legal or equitable, owing by a garnishee to a judgment debtor which can be attached, must be a debt due to such debtor alone, and where it is due to him jointly with another person it cannot be garnished:

Macdonald v. *The Tacquah Gold Mines Co.*, 13 Q. B. D. 535; *Webb* v. *Stenton*, 11 Q. B. D. 518.

A debt assigned by a person in trust for his intended wife, in contemplation of marriage is not garnishable, even although the settlement might be impeachable: *Vyse* v. *Brown*, 13 Q. B. D. 199.

As to when a solicitor's lien prevails over a garnishment proceeding: See *Dallow* v. *Garrold*, 13 Q. B. D. 543.

Moneys coming to a married woman under settlement are not on judgment against her and her husband the subject of garnishment: *Chapman* v. *Biggs*, 11 Q. B. D. 27.

Where money not attachable is in a garnishment proceeding to which no cause is shewn, ordered to be paid over to the attaching creditor, the rights of the latter cannot be questioned so long as the order for payment stands: *Randall* v. *Lithgow*, 12 Q. B. D. 525.

An award of arbitrators appointed under the Railway Act, of money due as the value of land, is not garnishable before conveyance: *Howell* v. *Met. D. R'y Co.*, 19 Ch. D. 508.

The income of money vested in trustees, not yet due is not garnishable: *Webb* v. *Stenton*, 11 Q. B. D. 518.

A subsequent encumbrancer cannot be cut out of his security by garnishment of moneys in the hands of a previous encumbrancer on sale of the premises: *Chatterton* v. *Watney*, 16 Ch. D. 378, 17 Ch. D. 259.

A garnishee order cannot be made nor summons issued attaching a debt from a partnership firm described by its partnership name: *Walker* v. *Rooke*, 6 Q. B. D. 631. See, also, the notes to section 21 *post*.

If there is a reasonable dispute or even a suggestion that trust moneys are not garnishable, an order for payment should not be made until all parties are before the Court: *Roberts* v. *Death*, 8 Q. B. D. 319.

The costs of all notices required to be given are to be costs in the cause, and in no case are they to be payable by the garnishee unless the Judge specially orders it. The notices must all be in writing and when sent by the Clerk, by mail, must be registered: Sinclair's D. C. Law, 1885, pages 17-22.

Relative to the extent of the liability of the garnishee in a garnishment proceeding, an eminent legal writer has said:

"As the attaching creditor can hold the garnishee only to the extent of the defendant's claim against the garnishee, and can acquire no rights against the latter except such as the defendant had; and as he is not permitted to place the garnishee in any worse condition than he would be in, if sued by the defendant; it follows necessarily, that whatever defence the garnishee could urge against an action by the defendant, for the debt in respect of which he is garnished, he may set up in bar of a judgment against him as garnishee: *Strong's Executor* v. *Bass*, 35 Penn. 333; *Myers* v. *Baltzell*, 37 Penn. 491; *Edson* v. *Sprout*, 33 Vermont 77; *Firebaugh* v.

Stone, 36 Missouri 111 ; *McDermott* v. *Donegan*, 44 Missouri 85 ; *Ellison* v. *Tuttle*, 26 Texas 283. Were it otherwise, an attaching creditor might obtain a recourse against the garnishee which the defendant could not ; a proposition, the statement of which, except as to cases of fraud is its own refutation." Drake on Attachment, 5th Edition, section 672.

For further reference on the subject of garnishment the reader is referred to the writer's works on Division Courts, as follows :—D. C. Act, 1879, pages 45, 147, 164, 251 and 253 ; D. C. Act, 1880, pages 18, 44, 98 and 100 ; D. C. Law, 1884, at pages 126-178 ; D. C. Law, 1885, pages 4, 29, 48, 84, 195, 254 and 282.

13. Section 147 of the said Act is hereby amended by adding thereto the following: R. S. O. c. 47, s. 147, amended.

"Or the parties to any action, may by writing, signed by themselves or their agents, agree to refer the matters in dispute to the arbitrament of any person or persons named in such agreement, which shall be filed with the Clerk, and be entered on the Procedure Book as notices are entered." Referring action to arbitration

The 147th section of the Division Courts Act will now read as follows:

"The Judge may, in any case, with the consent of both parties to the suit, or of their agents, order the same, with or without other matters in dispute between such parties, being within the jurisdiction of the Court, to be referred to arbitration to such person or persons, and in such manner and on such terms as he thinks reasonable and just; *or the parties to any action, may by writing, signed by themselves or their agents, agree to refer the matters in dispute to the arbitrament of any person or persons named in such agreement, which shall be filed with the Clerk, and be entered on the Procedure Book as notices are entered.*"

The amendment is given above in italics:

The writer is unable to see or ascertain what advantage is to be gained by this addition to the 147th section of the Division Courts Act, or what substantial improvement is made on the law as it stood. The only difference that the writer can discover between this and the law as it formerly was, is, that the parties may in writing do that which otherwise was usually done by consent in open Court. As a matter of practice a consent to arbitration was usually in writing, signed by the parties, their solicitors or agents, and produced in Court and acted upon as a matter of course by the Judge. He had not then, nor has he now, any power to make a *compulsory* reference to arbitration.

This amendment may dispense with the necessity of parties appearing at the hearing, what more it is difficult to discover: See Form of Order of Reference, at page 296 of Sinclair's D. C. Act.

The reader will find at pages 164-170 of Sinclair's D. C. Act, a synopsis of the law of Arbitration and Award.

In addition to the authorities there cited, general reference is made to Rob. & Joseph's Digest 114, 4224; Ontario Digest 12-20; L. R. Digest, (1880), 102-125; L. R. Digest, (1881-1885), 34. Russell on Awards.

The time for making an award may be extended by the Judge after the time for so making it has expired: *Lord* v. *Lee*, L. R. 3 Q. B. 404; *Denton* v. *Strong*, L. R. 9 Q. B. 117; *May* v. *Harcourt*, 13 Q. B. D. 688.

Unless there is agreement or statutory provision to the contrary, witnesses must be examined under oath: *In re Rushbrook and Starr*, 46 U. C. R. 73.

If servants or officers of either party are allowed to be present and take part in the deliberation of the arbitrators, it will invalidate any award made: *Re Hubbard* v. *The Union F. Ins. Co.*, 44 U. C. R. 391.

The fraudulent, improper or malignant conduct of the arbitrator alone, without any collusion with the person seeking to enforce the award is no defence to an action upon the award: *Norval* v. *Canada S. Ry. Co.*, 16 L. J. N. S. 53, S. C. 5 App. R., page 16 *per* Moss C. J.

Evidence taken behind the back of one of the parties renders the award bad: *Whitely* v. *MacMahon*, 32 C. P. 453. See page 4 *ante*.

Parties may waive the time for making the award by appearing on the arbitration without objection: *Thurlow* v. *Sidney*, 29 Grant, 497.

Where power is given to two arbitrators to appoint a third, the person so appointed is a third arbitrator, not an umpire: *Willson* v. *York*, 46 U. C. R. 289.

The counsel or solicitors of the parties can enlarge the time for making an award: *Oakes* v. *Halifax*, 4 Sup. R. 640.

Judgment could not be entered on an award under the 149th section of the Division Courts Act where the award did not fix with certainty the amount to be paid, or give precise data from which the amount could be ascertained from the award, the exact amount that should be paid: *Alexander* v. *McNear*, 34 Albany L. J. 296.

In Russell on Awards, 4th Ed. 444, it is thus laid down:—"Formerly if an award was defective the Court could not, without consent, send it back to the arbitrators to amend it. They could only set it aside." *Kynston* v. *Liddell*, 8 Moore 223; *Ex parte Cuerton*, 7 D. & R. 774.

It is submitted that such is the law in the Division Courts yet. The 213th section of the Common Law Procedure Act, (R. S. O. 655) does not nor does the preamble to that Act (R. S. O. 609) nor does the 244th section of the Division Courts Act apply to references in suits in the Division Courts: *Clarke* v. *Macdonald*, 4 Ont. R. 310; *Bank of Ottawa* v. *McLaughlin*, 8 App. R. 543.

Where a submission is silent as to costs an arbitrator has no power to adjudicate upon them, but each party must bear his own costs and half of the costs of the award: *Re Harding and Wren*, 4 Ont. R. 605; *Devanney* v. *Dorr*, 4 Ont. R. 206.

Interest in the subject matter of the reference by the arbitrator will invalidate the award. See page 10 *ante* and *Re Muskoka and Gravenhurst*, 6 Ont. R. 352; Russell on Awards, 4th Ed. 103, but if parties enter into a

submission knowing the interest of the arbitrator, the award is valid. The rule of law only applies to a *secret* interest.—*Ib.*

An arbitrator may be appointed verbally: *Cruickshank* v. *Corbey*, 30 C. P. 466, 5 App. R. 415 S. C.

An award must be signed by all the arbitrators in the presence of each other. *Freeman* v. *O. & Q. Ry. Co.*, 6 Ont. R. 413 and cases there cited; *Demorest* v. *G. J. Ry. Co.*, 10 Ont. R. 515.

The improper reception or rejection of evidence by an arbitrator without any corrupt intent does not amount to legal misconduct upon which an award will be set aside: *Webster* v. *Haggart*, 9 Ont. R. 27.

Where an action for tort that dies with the person is referred to arbitration, the reference drops on the death of either party, and any agreement contained in it that it shall survive such death is inoperative. *Bowker* v. *Evans*, 15 Q. B. D. 565.

The difference between *valuers* merely and arbitrators should always be kept in view: *In re Dawdy*, 15 Q. B. D. 426.

Power over "the cost of the reference" includes power to award the costs of the award. *In re Walker and Brown* 9 Q. B. D. 434.

In the absence of the 148th section of the Division Courts Act a reference would be revocable by either party before award made: *Fraser* v. *Ehrensperger*, 12 Q. B. D. 310.

A party cannot be a judge in his own cause, but, if his opponent consent to his deciding the question between them, the Court will not allow an objection afterwards though he decide it in his own favour: Russell on Awards, 4th Ed. 104.

There can be no binding award concerning an illegal matter: *Steers* v. *Lashley*, 6 T. R. 61.

Felony is not the subject of arbitration although some misdemeanors are: Russell on Awards, 4th Ed. 10.

An award ought to be possible. It should also be consistent and intelligible and not contradictory. It should not be repugnant: Russell on Awards, 4th Ed. 288.

There is no distinction between the award of a lay and legal arbitrator: Russell, 288.

It is no ground for setting aside an award that it was made contrary to the evidence: Bradshaw's Arbitration, 12 Q. B. 562.

An award should be positive either in affirmative or negative: *Ferguson* v. *Norman*, 4 Bing. N. C. 52.

Where the bad part of an award is separable from the good, the award will only be set aside as to the part that is bad; but if both parts are so connected as not to be separable, then the whole is bad: Russell on Awards, 4th Ed. 307-318.

The costs of the award are the amount of the arbitrator's charges,

which are usually paid to him when the award is taken up, but if the demand is excessive it is subject to taxation by the Clerk of the Court: Russell on Awards, 4th Ed. 353; Gray on Costs. 419.

When an award is made by an umpire on the disagreement of the arbitrators, or on their failing to award, he is entitled to charge the fees due to the arbitrators as part of the costs of the umpirage: *Ellison* v. *Ackroyd*, 20 L. J. Q. B. 193. If the umpire fail to charge them, the party who has paid the arbitrator's fees will be entitled to have the amount allowed him among other costs of the reference: Russell 353.

An arbitrator may in general fix the time and place of payment, though he need not do so: *Wilkinson* v. *Page*, 1 Hare 276.

He may award one party to give the other a promissory note payable at a future day: *Booth* v. *Garnett*, 2 Strange 1082. The arbitrator may order one party to execute a bond for the payment to the other of an ascertained sum of money at a specified time, or by instalments: Russell on Awards, 4th Ed. 388. He may add that if the sum awarded be not paid by the appointed day, the party shall pay a larger sum by way of penalty; or when the payment is to be by instalments, that if one be overdue the whole amount shall be payable at once: Russell 389.

The following is given as a Form of Order of reference. It is somewhat fuller than the authorized form to be found at page 296 of Sinclair's D. C. Act, some special clauses being added. The agreement of the parties to a reference may be framed from it.

ORDER OF REFERENCE.

In the Division Court, in the County of .

Between A. —— B. —— Plaintiff,

and

C. —— D. —— Defendant.

By consent of the plaintiff and defendant (*or* agents if so), given in open Court, (*or produced in writing to the Court, signed by themselves or their agents.*)

It is ordered that all matters in difference in this cause (*and if consented to, add*, "and all matters within the jurisdiction of this Court in difference between the said parties)," be referred to the award of

so as said award be made in writing, ready to be delivered to the parties entitled to the same, on or before the day of ;

and that the said award may be entered as the judgment in this cause.

(1) The said arbitrator to have power by writing, signed by him, from time to to time to enlarge the time for making his award.

(2) That if either of the parties be dead before the making of the award, that the same may be afterwards delivered to their respective personal representatives who shall require the same.

(3) That the costs of the reference and award shall be in the discretion of the said arbitrator (*or as the case may be.*)

(4) That the arbitrator shall be at liberty to order and determine what he shall think fit to be done by either of the parties respecting the matters referred.

(5) That the witnesses and parties shall be examined by the arbitrator on oath.

(6) That the arbitrator shall be at liberty to proceed *ex parte*, in case either party after reasonable notice, shall at any time neglect or refuse to attend on the reference.

(7) That the parties respectively shall produce before the arbitrator all books, deeds, papers, accounts, vouchers, writings and documents within their possession or control, which the arbitrator may require and call for as in his judgment relating to the matters referred.

(8) That neither party shall wilfully and wrongly do or cause to be done any act to delay or prevent the arbitrator from making his award.

(9) That neither of said parties shall bring or prosecute any action against the arbitrator concerning the matters referred.

(10) That if either party shall by affected delay or otherwise, wilfully prevent the arbitrator from proceeding in the reference, or from making his award, he shall pay such costs to the other as the arbitrator shall think reasonable.

(11) The said parties jointly and severally agree with the said arbitrator in consideration of his taking upon himself the burthen of the reference, to pay him his reasonable charges for the arbitration and award.

(*Here add any other terms that the Judge may prescribe or the parties may agree upon.*)

Given under the seal of the Court this day of 18 .

X.——— Y.———.

Clerk.

The writer has frequently observed the difficulty that is experienced in Court of framing an agreement of reference embracing the usual provisions without the aid of some work on arbitration. To meet this the foregoing form has been given, so that parties may have and readily select such clauses as they desire. In order to guide the Clerk in drawing up the order of reference and for brevity, the consent might simply refer to the different clauses by the numbers above given, and to the proper pages of this work.

The Judge should be satisfied, where the writing is signed by agents, that they have the authority they assume to exercise, otherwise if the absence of such authority was not afterwards waived all subsequent proceedings would be abortive: *Pole* v. *Leask*, 9 Jur. N. S. 829; *Myles* v. *Thompson*, 23 U. C. R. 553: *The Gore Bank* v. *Crooks*, 26 U. C. R. 251, 22 L. J. N. S. 228.

R. S. O. c 47, s. 199, repealed.

14. Section 199 of the said Act, is hereby repealed and the following substituted therefor:

Custody of goods seized under attachment.

199. All the property seized under the provisions of the previous sections, shall be, and remain in the custody and possession of the Bailiff to whom the warrant of attachment is issued, and he shall take and keep the same until disposed of by law, and he shall be allowed all necessary disbursements and expenses for keeping the same.

(2) Where the property is seized under the provisions of the preceding sections by any county contable, it shall be forthwith handed over to the custody and possession of the bailiff of the court out of which the warrant of attachment issued, or into which it was made returnable; and such bailiff shall take the same into his charge and keeping, and shall be allowed all necessary disbursements for keeping the same.

Section 199 of the Division Courts Act (Sinclair's D. C. Act 207 and 208) by this section repealed, was in these words:—

"All the property seized under the provisions of the preceding sections shall be forthwith handed over to the custody and possession of the Clerk of the Court out of which the warrant of attachment issued, or into which it was made returnable, and such Clerk shall take the same into his charge and keeping, and shall be allowed all necessary disbursements for keeping the same."

The change which has here been made in the law is simply this, that goods seized by a Division Court Bailiff under an attachment issued ander the provisions of the Division Courts Act are not now to be delivered over by the Bailiff to the Clerk, but instead thereof are to remain in the custody and possession of the Bailiff to whom the warrant of attachment issued. He is not to dispose of the same, but to keep them

until disposed of by law, and for which he is to be allowed all necessary disbursements and expenses for keeping the same.

If property is seized by a County Constable (which it seldom is) it is by this section to be handed over to the custody and possession of the Bailiff of the Court out of which the warrant of attachment issued, or into which it was made returnable. This is a much more reasonable way of disposing of the chattels than formerly existed. If such property is to remain in the custody of any officer of the Court, it had much better be in the hands of the Bailiff (who usually has a much better means of keeping it) than the Clerk of his Court. The Bailiff is allowed all necessary disbursements and expenses of keeping the same. Great care will have to be observed by Clerks in this matter by seeing that Bailiffs do not overcharge for keeping possession of goods attached. It is to be regretted that the Legislature has not, under certain restrictions, allowed the sale of such goods before judgment. It most cases a sale would be in the interest not only of the debtor but of the creditor as well.

For a discussion of the law of Attachment in the Division Courts see Sinclair's D. C. Act 199-213.

R. S. O. c. 47, ss 204, 205, amended.

15. Sections 204 and 205 of the said Act are hereby amended by striking out the word "clerk" where it occurs in each of said sections, and the word "bailiff" shall be substituted therefor.

The provision made by this section is simply carrying out the view expressed by the legislature in the previous section, namely, that where goods, even of a perishable nature, are seized under a warrant of attachment under the authority of any Division Court Act, the right to receive and hold the same is vested in the Bailiff of the Court, which right formerly belonged to the Clerk. This section now provides that goods of a perishable nature are to be sold by the Bailiff of the Court and not as formerly by the Clerk. As expressed in the notes to the next previous section, the writer's opinion is that the possession and power to sell had better be with the Bailiff than the Clerk of the Court. The Bailiff can usually more cheaply and safely keep possession, and if necessary, make sale of any goods attached than can the Clerk.

16. Section 206 of the said Act is hereby repealed, and the following is substituted therefor : R. S. O. c. 47, s. 206, repealed.

206. The moneys so made shall be by the bailiff paid over to the clerk, and the residue, if any, after satisfying such judgments as aforesaid, with the costs thereupon, shall be delivered to the defendant or his agent, or to any person in whose custody the goods were found ; and the responsibility of the clerk in respect of such property shall cease. Disposition of moneys realized on goods sold.

The 206th section of the Division Courts Act as it previously existed will be found at pages 212 and 213 of Sinclair's Division Courts Act.—It was in these words :

"The residue, after satisfying such judgments as aforesaid, with the costs thereupon, shall be delivered to the defendant or to his agent, or to any person in whose custody the goods were found ; whereupon the responsibility of the Clerk as respects such property shall cease."

After the Bailiff has made any money by sale of the goods seized he must pay it over to the Clerk. Should there be a residue of the goods seized, after payment of all judgments and costs, the same is to be delivered to the defendant, his agent, or to the person in whose custody the goods were found. When this is done, the responsibility of *the Clerk* in respect of such property shall cease.

It is submitted that in view of the amendments made by the 14th and 15th sections of this Act, that the word "Clerk" should be "Bailiff." The possession and responsibility for property seized under attachment having been by the two next previous sections changed from the Clerk to the Bailiff, the discharge of the Bailiff from further responsibility would surely be the object in view. Yet it would seem that according to judicial construction the word "Bailiff" cannot be read for the word "Clerk," which the legislature has clearly employed : *In Green* v. *Wood*, 7 Q. B. 178. Denman C. J., in speaking on this point, says :—"We are bound to give to the words of the legislature all possible meaning which is consistent with the clear language used. But, if we find language used which is incapable of a meaning, we cannot supply one. It is true that we have here words which as they stand are useless ; a circumstance, perhaps, not altogether unprecedented. But to give an effectual meaning, we must alter, not only

"or" into "and" but "issued" into "levied." It is extremely probable that this would express what the legislature meant. But we cannot supply it. Those who used the words thought they had effected the purpose intended. But we, looking at the words as Judges, are no more justified in introducing that meaning than we should be if we added any other provision. We can do no more than give such a meaning as the words authorize."—See also Maxwell on Statutes, 2nd Edition.

It may be argued that the word "property" here used may mean any balance of money which the Clerk might have on hand. This is very doubtful, for the word "moneys" is used in a previous part of the section. Besides, the word "property" taken in connection with the rest of the context could scarcely be intended to mean any surplus moneys in the hands of the Clerk.

It would seem as if this section was framed without due regard to the two next previous sections, the latter part referring more to what the law was than to what it now is.

The Clerk would certainly discharge himself of any liability by delivering the residue of any moneys, after satisfying all judgments obtained on attachment proceedings, to the defendant or his agent, or to the person in whose custody the goods were found. If the residue should be claimed by a person as agent of the debtor, the Clerk should be careful to see that such person had proper authority to receive it. See the conclusion of the notes to section 13.

17. Section 210 of the said Act, is hereby amended by adding the following sub-section thereto : R. S. O. c. 47, s. 210, amended.

(4) In case the bailiff has more than one execution or attachment at the suit or instance of different persons against the same property claimed as aforesaid, it shall not be necessary for the bailiff to make a separate application on each execution or attachment; but he may use the names of such execution or attaching creditors collectively in such application, and the summons may issue in the name of said creditors as plaintiffs.

Section 210 of the Division Courts Act hereby amended will be found at pages 214-217 of Sinclair's D. C. Act. This provision will be found most beneficial in its operation. Hitherto a Bailiff had for his own protection to interplead separately in all cases where a seizure had been made by him and claim made to the property. The inconvenience and expense of that course was frequently found very great. Sometimes a test case was made by agreement of parties, by which the others were determined, but in the absence of that, an issue had to be made in each case. The above section now renders that unnecessary.

This law was so also in the higher Courts in respect to Interpleader by the Sheriff until the year 1873, when the 41st section of the Administration of Justice Act made a change in that respect. The amendment which that section effected will be found in the R. S. O., Chapter 54, section 11.

This section is substantially a re-enactment of that clause applying the procedure however of the Division Courts. The section under consideration would only have application where all the writs of execution or warrants of attachment were from a Division Court: *Strange* v. *Toronto Telegraph Co.*, 8 P. R. 1. It is needless to say the costs, including those of the Bailiff, must be taxed on the Division Court scale: *Masuret* v. *Lansdell*, 8 P. R. 57; *Phipps* v. *Beamer*, 8 P. R. 181; *Beaty* v. *Bryce*, 9 P. R. 320; *Christie* v. *Conway*, 9 P. R. 529; *Arkell* v. *Geiger*, 9 P. R. 523.

The application by the Bailiff for an interpleader summons, Sinclair

D. C. Act 288, and the summons to be issued by the Clerk in pursuance of it, must give the names of all the execution or attachment creditors as in the suits, and all must be duly served in order to bind them. Should any creditor not be brought into the interpleader issue he would not be bound by the proceedings. Should a Bailiff disregard this section, and still cause separate interpleader summonses to be issued, he might have the strict right to do so, as the language is apparently permissive, but if such were done without good cause, he as an officer would be subject to the summary jurisdiction of the Court, and would be made bear the unnecessary expense, and the cases too could be consolidated: *Merchants Bank* v. *Herson*, 10 P. R. 117. In Interpleader proceedings in the High Court of Justice or County Courts the Sheriff must, where there are Division Court execution creditors, bring them into the application too: *Macfie* v. *Hunter*, 9 P. R. 149, 49 Victoria, Chapter 16, section 13. The validity of the plaintiff's judgment, or other proceedings against creditors generally, may be tried in an interpleader issue: *Leech* v. *Williamson*, 10 P. R. 226, D. C. Act, section 210, sub-section 3; *Wilson* v. *Wilson*, 2 P. R. 374; *Klein* v. *Klein*, 7 U. C. L. J. 296; *McKenzie* v. *Harris*, 10 U. C. L. J. 213; *Parker* v. *Howell*, 7 U. C. L. J. 209; *Balfour* v. *Ellison*, 8 U. C. L. J. 330, 3 P. R. 30; *Bird* v. *Folger*, 17 U. C. R. 536; *Armour* v. *Carruthers*, 2 P. R. 217; *White* v. *Lord*, 13 C. P. 289; *Dickson* v. *McMahon*, 14 C. P. 521; *Bevan* v. *Wheat*, 14 C. P. 51; *McGee* v. *Baird*, 3 P. R. 9; *McDonald* v. *Boice*, 12 Grant 48; *Commercial Bank* v. *Wilson*, 14 Grant 473, 3 E. & A. 257, S. C.; *Lovell* v. *Gibson*, 19 Grant 280; *Martin* v. *McAlpine*, 8 App. R. 675; *Meriden Silver Co.* v. *Lee*, 2 Ont. R. 451; *Ex parte Hall*, 19 Ch. D. 580; *Girdlestone* v. *Brighton Aquarium Co.*, 3 Ex. D. 137; *In re Youngs, Doggett* v. *Revett*, 30 Ch. D. 421; *Sloan* v. *Whalen*, 15 C. P. 319.

But if there was merely an *irregularity* in the proceeding and not fraud or collusion, it could not be impeached by other creditors: *Wilson* v. *Wilson*, 2 P. R. 374; *Klein* v. *Klein*, 7 U. C. L. J. 296; *McKenzie* v. *Harris*, 10 U. C. L. J. 213; *Balfour* v. *Ellison*, 3 P. R. 30.

There could be an Interpleader in respect to any of the kinds of property mentioned in sections 210 and 171 of the Division Courts Act: *Brown* v. *Nelson*, 10 P. R. 421.

This clause must always be read in connection with the 6th section of the Division Courts Amendment Act of 1885, as well as other Division Court Acts, as to which and the subject of Interpleader generally: See Sinclair's D C. Law 1885, 136-188 and 49 Victoria, (Ontario), chapter 16, section 13.

Examination of witnesses whose attendance at trial cannot be obtained.

18. In case it be made to appear to the Judge that a material and necessary witness residing within the Province is sick, aged, or infirm, or that he is about to leave the Province, and that his attendance at Court as a witness cannot by reason thereof be procured, the Judge may make an order appointing a suitable person to take the evidence of said person. A copy of the order, with two days' notice of the time, and place of the examination shall be served upon the opposite party, his solicitor or agent, who may appear, and cross examine the witness. The evidence shall be taken on oath, and shall be reduced to writing, and signed by the witness, and shall be transmitted to the Clerk of the Court, and shall be by him kept on file, and may be used upon the trial, saving all just exceptions. The costs of the order shall be in the discretion of the Judge, and the reasonable charge of the examiner (to be fixed by the judge) shall, in the first instance be paid by the party obtaining the order, as in the case of witness fees, and shall thereafter be paid as the Judge may order.

This is a new provision in Division Court practice, but the necessity for it has long been felt. It affords an inexpensive means of getting evidence that might otherwise be unavailable, and in many cases will prevent injustice being done by reason of the absence, illness or death of material witnesses pending the suit, or in any event prevent one or more postponements of a trial. The principle of the enactment lies in the old equitable doctrine of perpetuating testimony, and the procedure is somewhat similar to that of the former Court of Chancery in taking evidence in actions pending in it *de bene esse*. The Judicature Act has applied the same procedure

to all the Divisions of the High Court of Justice and to the County Court. See Rule 285, Maclennan's Jud. Act, 2nd Ed.

In order to found an application under this section the following circumstances must concur:

1. That the person proposed to be examined must be a material and necessary witness residing within the Province.

2. That he must either be sick, aged, infirm, or be about to leave the Province. The existence of any one of these will be sufficient.

3. That in consequence of the existence of one or more of these facts the attendance at Court of the witness cannot be procured.

A material witness for a party is one whose evidence is pertinent to the question to be tried, and of importance to the person calling him.

A necessary witness is one whose evidence is so important that it would not be prudent or safe for a party to proceed to trial without it.

It is doubtful whether the fact that a witness is in a state of pregnancy, or about to be delivered of a child is a cause for granting an order; see *R.* v. *Wellings*, 3 Q. B. D. 426. It will be noticed that the section speaks only in the present tense when speaking of the witness, and does not in express terms point to a witness at some future time, and consequent inability then to attend the trial, but probably the Statute points to futurity as well. At all events, in applications founded on pregnancy of the witness, an affidavit of a competent person should be produced shewing, that the delivery would probably happen about the time fixed for the trial, or so near as to render the attendance of the witness perilous: *Abraham* v. *Newton*, 8 Bing. 274; See, also, *R.* v. *Inhabitants of Huddersfield*, 7 E. & B. 794.

An order may be granted where a witness is so unwell that there is no probability of his being able to attend the trial: *Pond* v. *Dimes*, 3 M. & Sc. 161; *Bellamy* v. *Jones*, 8 Ves. 31; *Jepsom* v. *Greenaway*, 2 Fowl. Ex. Pr. 102.

The affidavit of a medical man should generally be produced in such cases: *Davis* v. *Lowdnes*, 7 Dowl. 101; *Duke of Beaufort* v. *Crawshay*, L. R. 1 C. P. 699; or else his certificate or opinion should be verified by affidavit, but the affidavit of the Solicitor of his information and belief, with the grounds thereof, was held sufficient in *Baker* v. *Jackson*, 10 P. R. 624.

Where an application was made to examine the surviving witness to a will *de bene esse* on the ground that the parties concerned all lived abroad, and that the surviving witness to be examined was greatly afflicted with the gravel, the order was made, although the affidavit only stated the witness was upwards of 60 years old: *Fitzhugh* v. *Lee*, Ambl. 65.

The Court of Chancery always allowed the examination *de bene esse* of a witness about to go abroad: *Brown* v. *Child*, 3 Sim. 457; *McIntosh* v. *Great Western R'y Co.*, 1 Hare 328; *McKenna* v. *Everitt*, 2 Beav. 188; *Grove* v. *Young*, 3 De G. & S. 397, 13 Jur. 847. See, also, *Warner* v. *Mosses*, 16 Ch. D. 100.

But if it is in the power of the party applying to detain the witnesses

till they have been examined in the ordinary course the order will not be made: *East India Company* v. *Naish*, Bunb. 320.

For practice of the Court of Chancery as to examining witnesses *de bene esse*, See Dan. Ch. Pr. 5th Ed, 814-822.

The section under consideration in terms makes no provision for the examination of the parties themselves on their own motion, but it is probable since parties may be witnesses on their own behalf an order would be made in a proper case even on motion by the party himself: See *Moffat* v. *Prentice*, 9 L. J. N. S. 159; *Fisken* v. *Chamberlain*, 9 P. R. 283; *Fischer* v. *Hahn*, 13 C. B. N. S. 659; *Castelli* v. *Groom*, 18 Q. B. 490, but such examination might certainly be compelled by the opposite party.

Where the motion is made by the party himself for his own examination the Court must be thoroughly satisfied of the *bona fides* of the application, and that it is not made for the purpose of avoiding cross-examination: *Berdan* v. *Greenwood*, 20 Ch. D. 764; *Langen* v. *Tate*, 24 Ch. D. 522. As a rule the order should not be granted, where the action was commenced by special summons, until the defendant has filed a disputing note, as until then it is not known that any witness is necessary: See *Mondel* v. *Steele*, 8 M. & W. 300; *Smith* v. *Greey*, 10 P. R. 531; *Allan* v. *Andrews*, 5 P. R. 32; *Finney* v. *Beesley*, 17 Q. B. 86; *Clutterbuck* v. *Jones*, 6 D. & L. 251; *Frere* v. *Green*, 19 Ves. 320; but see *Dew* v. *Clarke*, 1 S. & S. 108, 115; *Prichard* v. *Gee*, 5 Mad. 364. In garnishment proceedings no order should as a rule be granted until notice under the 12th section of this Act has been filed.

The application should not as a rule be made *ex parte*: *McKenna* v. *Everitt*, 2 Beav. 188; *Anderson* v. *Anderson* 1 Cham. R. 291; *Hope* v. *Hope*, 3 Beav. 317, 323; *Early* v. *McGill*, 1 Cham. Rep. 100, 257; *Bidder* v. *Bridges*, 26 Ch. Div. 1; McLennan's Judicature Act, 2nd Ed. 414.

But where the reason for application is that the witness is dangerously ill or over 70 years of age, the High Court of Justice has generally granted the order *ex parte*: See *Bellamy* v. *Jones*, 8 Ves. 3; *McKenna* v. *Everitt*, 2 Beav. 188; *Oliver* v. *Dickey*, 2 Cham. R. 87; *Crippen* v. *Ogilvey*, 2 Ch. Cham 304. In *Bidder* v. *Bridges*, 26 Chy. Div. 1 an order was made in Chambers on an *ex parte* application by the plaintiff to examine *de bene esse* thirty witnesses upon an affidavit of the plaintiff's solicitor, merely stating that he was advised that they were material witnesses, that they were all above seventy years of age and that he was advised and believed that by reason of their age it was desirable that their examination should be taken without delay.

On a motion in Chambers to discharge the order Kay J. said:—"I have not the smallest doubt that where an order has been obtained *ex parte*, upon an application to discharge that order the parties who were not before the Court have just as much right to be heard and to urge any ground for discharging the order as they would have had if they had been there when

the order was made to contend that it should not be made." The learned Judge discharged the order on the ground that the affidavit was insufficient. On appeal to the Court of Appeal, the Lord Chancellor, (Earl of Selborne), said, at page 9 of the volume just cited:—"Now I assume that there is no objection in a case in which the Court thinks it right to an order being made *ex parte* for the examination of witnesses *de bene esse*. There may be many cases in which the ends of justice may require it, but every such order must be taken subject to being discharged; if any persons seeking to discharge it can show that it was not proper because not necessary for the purposes of justice, and I cannot think that the earlier authorities such as that before Lord Eldon, of *Bellamy* v. *Jones*, 8 Ves. 31; and others which have been mentioned really meant more than this, that *prima facie* and for the purpose of the question whether the order was regularly made *ex parte* or not, if it were brought within a certain category of cases it would be right and not irregular to obtain it *ex parte*. I do not understand Lord Eldon as having meant to lay down even as to those cases in which there would be sufficient *prima facie* ground for obtaining an *ex parte* order to examine witnesses *de bene esse* that no reasons or grounds could be shewn, why, upon a motion to discharge such an order consistent with its formal regularity, it should be discharged. To take this very matter of the witnesses being seventy years of age, which is generally a good *prima facie* ground for an order to examine witnesses *de bene esse*, such a general practice is like all other legal rules adapted to ordinary cases, and if it is applied in an extraordinary manner—in a manner which the ends of justice do not require—which the principle does not make necessary, although the order may not be irregular—even if there be proper evidence that the witnesses were above seventy years of age, there is nothing in the practice to prevent the Court from discharging or varying such an order upon a proper application under the particular circumstances of the case."

The general rules upon the subject may thus be expressed:

1. The order should not in general be granted *ex parte*.

2. If it appears upon the affidavits that the witness is dangerously ill, the Judge may grant the order *ex parte*.

3. So in case he is over seventy years of age, especially if he is the only witness to the fact.

4. If he is about to leave the Province and there is danger that his evidence may be lost unless promptly obtained, the Judge would be justified in granting the order *ex parte*.

5. In all cases in which the order is granted *ex parte*, the same grounds may be urged on a motion to discharge the order as might have been urged, if notice had been given. The fact that the witness was over sixty-six years of age and frequently suffered from ill health would be sufficient to found an application on the ground of his being "aged." *Brown* v. *Brown*, L. R. 1 P. & D. 720.

Where the proposed evidence would be inadmissable no purpose would be served in granting the application, and it would probably be refused: *Fisher* v. *Berrell*, 1 Dowl. N. S. 565; or would not support any issue to be tried: *Jones* v. *Tobin*, 4 Bing. N. C. 123; *Speeding* v. *Young*, 16 C. B. N. S. 824; *Galloway* v. *Keyworth*, 15 C. B. 228.

As will be noticed the section provides merely that the Judge may name a person to take the evidence of the witness and provides no mode of enforcing the attendance of the witness, and gives no power to fine or imprison him in case of non-attendance.

The Division Courts are not Courts of Record: R. S. O., chapter 47, section 7, Sinclair's D. C. Act, 4. Not being Courts of Record their power of imprisonment is confined strictly to those given by the particular Statutes constituting them or regulating their procedure: *R.* v. *Lefroy*, L. R. 8 Q. B. 134; *Martin* v. *Bannister*, 4 Q. B. D. 491.

The only provisions as to imprisonment by Division Court Judges are to be found in sections 97, 182 and 217 of the Division Courts Act, Sinclair's D. C. Act, 127, 193 and 222.

In *Ex parte Jolliffe* 42 L. J., Q. B. 121, it was held that a County Court Judge, under the English County Courts Act, could not convict for contempt a person who had published language of a contumelious character against him in a local newspaper on the ground that the contempt was not *in facie curiæ* and that it was not one of those contempts mentioned in the Act. See Sinclair's D. C. Act, 222-223.

The application should in general be made within a reasonable time after the filing of the notice of defence, especially when the application is made on the part of the defendant: *Brydges* v. *Fisher*, 4 M. & Sc. 458; *Summers* v. *Rawson*, 3 Jur. 288. This rule also applies when the application is made by a plaintiff: *Pirie* v. *Iron*, 8 Bing. 143; *Steuart* v. *Gladstone*, 7 Ch. D. 394.

The name of the witness sought to be examined ought to be stated in the affidavit: *Gunter* v. *M'Tear*, 1 M. & W. 201; *Norton* v. *Lord Melbourne*, 3 Bing. N. C. 67.

The order must state the names of the witnesses to be examined. An order giving leave to examine witnesses generally was held objectionable. No such power should be given to either side: *Warner* v. *Mosses*, 16 Ch. Div. p. 103.

Sometimes it may be necessary to state upon what facts it is proposed to examine the witness: See *Barry* v. *Barclay*, 15 C. B. N. S. 849.

No provision is made as to the evidence by which the application is to be supported. An affidavit by a person having knowledge of the facts would be sufficient. If a solicitor were employed, he or his managing clerk would ordinarily be able to make the necessary affidavit: *McHardy* v. *Hitchcock*, 17 L. J. Ch. 256; *Elmsley* v. *Cosgrave*, 6 P. R. 164; *Lloyd* v. *Henderson*, 6 P. R. 254; *Baker* v. *Jackson*, 10 P. R, 624.

It is not generally necessary for the defendant to swear to merits when the application is made on his part, nor is it generally necessary in such cases to swear that it is not for delay: *Baddeley* v. *Gilmore*, 1 M. & W. 55.

If there is reason to suspect that the object of the defendant in making the application is to delay the plaintiff, the Court will sometimes order him to bring the money into Court: *Sparkes* v. *Barrett*, 5 Scott 402; *Lloyd* v. *Key*, 3 Dowl. 253.

It is to be regretted that the legislature in providing for the examination *de bene esse* of witnesses did not place beyond a doubt the means of compelling the attendance of the witness and did not impose some punishment upon defaulters. The law is always construed strictly in matters affecting the liberty of the subject, and the Courts would be very apt, in case a witness should be committed for disobeying a subpœna issued as suggested, to hold that section 97 was not wide enough to cover examinations elsewhere than at trials and arbitrations.

In the High Court the witness might for wilful disobedience of the order be attached for contempt: *Haldane* v. *Eckford*, L. R. 7 Eq. 425; *Peterson* v. *Bowes*, 4 Grant, 44; *Ross* v. *Robertson*, 2 Ch. Cham. 66; *The Merchants Bank* v *Pierson*, 8 P. R. 123: *Joy* v. *Hadley*, 22 Ch. D. 571; but in the Division Court in the absence of express Statutory provision, the power to impose a penalty for refusing to attend on the order to examine does not seem to exist: *R.* v. *Lefroy*, L. R. 8 Q. B. 134; *Martin* v. *Bannister*, 4 Q. B. D. 491.

Further, the production of books and documents has not been provided for. A copy of the order must be served upon the opposite party, his solicitor or agent. Rule 125 of Division Courts, in terms applies only to notices to be given to the opposite party, and it is doubtful whether service in the manner therein provided would be good service under the Statute of a copy of the order.

Two days notice must be given. The general principle of law as to computation of time is that one day shall be inclusive and the other exclusive: *Cameron* v. *Cameron*, 2 P. R. 259; *R.* v. *Cumberland* (*Justices*), 4 N. & M. 378. See, also, *Lester* v. *Garland*, 15 Ves. 248; Arch. Pract. 12th Ed. 162; Sinclair's D. C. Law, 1885, 21. If the last be a Sunday, it would be included.—*Ib.*

The Statute says:—"The evidence shall be taken on oath." Power is given by section 19, sub-section (2) of this Act, to the person appointed to administer the oath. This includes affirmations and declarations: See R. S. O., chapter 62, sections 12-14.

The examiner has no discretion as to the materiality of the questions put unless upon matters which would clearly and palpably not be evidence: *Surr* v. *Walmsley*, L. R. 2 Eq. 439; but if any question is objected to, the objection should be noted by him: *Robinson* v. *Davies*, 5 Q. B. D. 26; *In Wright* v. *Wilkin*, 4 Jur. N. S. 804, it was said that the Court would not

delegate to the examiner the power of treating a witness as hostile so as to authorize the examination to be conducted in the nature of a cross-examination by the party calling him, but Lord Cairns L. C. in *Ohlsen* v. *Terrero*, L. R. 10 Ch. 129, strongly disapproved of this ruling, and pointed out that if a witness or his counsel thought that he was being unfairly dealt with upon an examination, he might refuse to answer a particular question, and upon that refusal the matter might be brought before the Court, who would decide whether the examiner was pursuing a proper course or not in allowing the witness to be treated as a hostile witness. See, as to hostile witnesses, Taylor on Ev. 7th Ed., 1177, 1178; *Rice* v. *Howard*, 16 Q. B. D. 681; see, also, *Buckley* v. *Cooke*, 1 K. & J. 29. The depositions must be signed by the witness, if not signed they could not be received in evidence except by consent.

The examiner's room is not a public court, and he must exclude other persons than those entitled to be there, if requested by either party. *In re Western of Canada Oil, Lands, and Works Co*, 6 Ch. D. 109.

The depositions may be used at the trial. The fact that the Judge has made the order directing the evidence to be taken by an examiner is sufficient to enable the party obtaining the order to put the depositions in evidence saving all just exceptions: *Ryan* v. *Devereux*, 26 U. C. R. 100. In *Bidder* v. *Bridges*, 26 Chy. Div. 1, at page 15, the Court required an undertaking from the plaintiff that if requested by the defendant at the trial he would call any of the witnesses who should have been examined *de bene esse* who might be alive at the trial.

If the examination is not used no costs of it should be allowed: *McMillan* v. *McMillan*, 8 L. J. N. S. 285; *Curling* v. *Robertson*, 7 M. & G. 525; *Ridley* v. *Sutton*, 1 H. & C. 741; *Dominion &c. Co.* v. *Stinson*, 9 P. R. 177. But where a witness was so old and infirm that it was prudent to take his examination, but he was afterwards able to attend the trial, the plaintiff was allowed both the costs of the examination and of his attendance at the trial: *Duke of Beaufort* v. *Earl of Ashburnham*, 13 C. B. N. S. 598. In that case the expenses of the journey of the son of the witness and his attendance upon him in giving evidence, in consequence of the age and infirmity of the witness, were also allowed.

Unless some special ground for ordering otherwise appears the costs of the examination will usually be made costs in the cause: *Prince* v. *Samo*, 4 Dowl. 5; *McMillan* v. *McMillan*, 8 L. J. N. S. 285.

The Statute requires two days' notice of the time and place of the examination to be served upon the opposite party, his solicitor or agent, in view of his appearing and cross-examining the witness if he choose to do so.

If the examination should take place without such notice, and the opposite party in consequence of not being apprized did not attend, the

depositions would be rejected: *Steinkeller* v. *Newton*, 9 C. & P. 313 *ante* pages 3 and 9, but it is not requisite that he should exercise that power; all that is required is that he have *the opportunity* of doing so: *Cazenove* v. *Vaughan*, 1 M. & S. 4.

If the opposite party should give notice that he would not take part in the examination it is possible that such would be a waiver of the giving of notice: *McCombie* v. *Anton*, 6 M. & G. 27.

The deposition could not be received as evidence in a suit between other parties: *Doe* v. *Derby*, 1 A. & E. 783, 786. All just exceptions to the admission of the deposition in evidence are reserved to the opposite party. On this point and the subject of examination generally, see Sinclair's D. C. Law, 1885, 110-127. If no objection should be made before the examiner it might have the effect of waiving the right afterwards to object to the admissability of the objectionable part at the trial: *Robinson* v. *Davies*, 5 Q. B. D. 26.

A mere irregularity in the taking of the deposition would be the subject of special application to the Judge to have it suppressed, but it would not be an objection to its admissability at the trial: *Grill* v. *Iron Screw Collier Co.* (*Limited*) L. R. 1 C. P. 600.

The evidence must be taken on oath, reduced to writing, signed by the witness, transmitted to the Clerk of the Court, and by him kept on file, ready to be produced when required. To render it evidence it should be produced from the proper custody, and purport to be duly taken: *Redford* v. *McDonald*, 14 C. P. 150. The production by the Clerk would not be necessary to its reception, but if otherwise correct the evidence would, it is submitted, be receivable.

It would seem that the evidence could be taken *if material*, whether there were other witnesses to testify to the same fact or not. The writer submits that the rule laid down in that respect in *Jameson* v. *Jones*, 3 Ch. Cham. 98, does not apply to this section.

If it appeared that the witness was able to attend the trial the deposition could not be used. The writer submits that the onus of shewing such facts as exclude the deposition as evidence is on the party opposing its reception: See *Ryan* v. *Devereux*, 26 U. C. R. at pages 108, 109.

The application for order, if not *ex parte*, may be either by summons or notice: Sinclair's D. C. Law, 1885, 275, and may be served in the manner pointed out in pages 96-109 of that work. Notice is more consistent with the practice in the higher Courts.

Either party could use the deposition as evidence.

The following are given as Forms that may be used on applications under this section: - -

FORM OF AFFIDAVIT FOR ORDER TO EXAMINE A SICK, AGED, OR INFIRM WITNESS.

In the Division Court of the County of .

Between A——— B———, Plaintiff,

and

C——— D———, Defendant.

I, , of &c., the above named plaintiff (*or* defendant) in this cause, make oath and say :

1. This action is brought for (*here state concisely the cause of action sued for.*)

2. The summons herein was served on or about the day of A. D. 18 , and this action can be heard at the sittings of the Court which will be held on the day of next (*or* instant.)

3. The defendant has (*or if the defendant makes the affidavit,* "I have") filed a notice disputing the plaintiff's claim herein.

4. That E. F., of &c. (*a person residing within the Province*) is a material and necessary witness on my behalf as I am advised and verily believe, and I cannot safely proceed to the trial hereof without his evidence, and that the materiality of his evidence consists in this (*here in a general way describe it*).

5. The said E. F. is sick, being dangerously ill with (*here describe disease*) and not expected to recover (*or as the case may be*), *or* that he is "aged," *or* "infirm," being now years of age, *or* "that he is about to leave the Province" (*as the case may be*), and that his attendance at Court as a witness cannot by reason thereof be procured.

6. I am advised and believe that I have a good cause of action (*or* defence) herein on the merits, and that this application is made *bona fide* and not for the "purpose of delay."

Sworn, &c.

[*The affidavit should clearly shew that the person proposed to be examined is weak, aged, or infirm, or about to leave the Province, and that his attendance at Court as a witness cannot by reason thereof be procured. If possible this should not be left to a general statement merely, but facts and circumstances should be given. If founded on sickness of the witness, an affidavit by or a verified certificate of the medical attendant should form part of the application, the former being preferable. The affidavit had better be made by the applicant, his solicitor, or agent. As a general rule the materiality of the proposed evidence need not be given, as appears in the 4th paragraph, but if the application is likely to be opposed, or there is anything exceptional in the circumstances, it had better be stated with particularity.*]

I

FORM OF NOTICE OF APPLICATION FOR ORDER TO EXAMINE SICK, AGED, OR INFIRM WITNESS.

In the Division Court of the County of .

Between A—— B——, Plaintiff,

and

C—— D——, Defendant.

Take notice, that a motion will be made on behalf of the above named plaintiff (*or* defendant) to the Judge of this Court, at his Chambers in the Court House, in the City of Hamilton (*or as the case may be*) on the day of , 18 , at o'clock in the forenoon, or so soon thereafter as the motion can be heard, for an order under the 18th section of the Division Courts Amendment Act, 1886, to examine E. F., of &c., a material and necessary witness in this cause for the plaintiff (*or* defendant), under the provisions of said section, and that on such motion will be read the affidavits of , true copies of which are hereto annexed.

Dated the day of 18 .

(*Signature of the party, his Solicitor or Agent.*)

To

(*Name of party to whom notice given.*)

[*The application may be made either by notice or summons under Rule No. 184, which came into force on the 1st of January, 1885, Sinclair's D. C. Law, 1885, page 275. Copies of the affidavits, &c., on which the application is founded should be attached to the notice served. On the motion, the applicant should produce an affidavit of service of the notice of motion and of the copies of affidavits, entitled in the Court and cause. In ex parte applications, of course, only the papers upon which the motion is made need be produced to the Judge. The writer would recommend in all cases not of an extreme nature or of great urgency, that ex parte applications should be discouraged. The right of the opposite party to cross-examine at the trial should not be interfered with unless clearly for good cause: Berdan v. Greenwood, 20 Ch. D. 764-769. A party takes an ex parte order at the risk of having it discharged on good grounds: Bidder v. Bridges, 26 Ch. D. 1. An ex parte order should not be made for the examination of the applicant: Price v. Bailey, 6 P. R. 256. It is very doubtful if the application should in any case be granted for the examination of an expert; See ante page 26. The writer sees no reason why the Judge should not, if he deems it necessary, require some general statement of the evidence proposed to be taken, and if it does not appear to be material, to refuse the order: Langen v. Tate, 24 Ch. D. 522.*]

FORM OF ORDER FOR EXAMINATION OF SICK, AGED, OR INFIRM WITNESS, WHERE BOTH PARTIES APPEAR ON APPLICATION.

In the Division Court of the County of .

Between A——— B———, Plaintiff,

and

Date, &c. C——— D ———, Defendant.

Upon the application of the above named plaintiff (*or* defendant) in this cause, and upon reading the affidavit of filed herein, notice of this application and affidavit of service thereof, and of a copy of said affidavit of the said , on the defendant (*or* plaintiff) in this cause, and upon hearing the parties by their solicitors, (*or* agents) :

It is ordered that G. H., of &c., do take the evidence on oath of E. F., of &c., a witness on behalf of the plaintiff (*or* defendant), pursuant to the 18th section of the Division Courts Amendment Act, 1886, at such time and place as the said G. H. may by writing appoint, and shall reduce such evidence to writing, and cause the same to be signed by the said E. F., and when so signed shall duly transmit the same to the Clerk of this Court.

It is further ordered, that the defendant (*or* plaintiff), his solicitor or agent shall have two days' notice of the time and place of such examination : that the costs of this order shall be costs in the cause, and that the costs of the examiner be reserved until after such examination. (*Any other terms may be here inserted.*)

JUDGE.

[*Should the application be made ex parte, a proceeding to be discouraged, except in urgent or extreme cases : Berdan v. Greenwood, 20 Ch. D. 764-769; Bidder v. Bridges, 26 Ch. D. 1, the above Form can easily be adapted to it. The Statute says nothing about payment to the witness of his expenses of attendance, It is submitted that before being sworn he would, if demanded by him, be entitled to receive the ordinary fees of a witness in the Division Court. See Sinclair's D. C. Law, 1885 126.*]

Examination of witness residing at a distance from place of trial.

19.—(1) An order may also be obtained for the examination of a witness who resides in a remote part of the Province, and at a great distance from the place of trial, if it be clearly made to appear that his attendance cannot be procured, or that the expense of his attendance would be out of proportion to the amount involved in the action, or would be so great that the party desiring his attendance should not, under the circumstances, be required to incur the same; and the proceedings thereon, and the order as to costs, shall be the same as in the case of an order in the next preceding section mentioned.

(2) The person appointed under this and the next preceding section shall have authority to administer an oath to the person to be examined.

An order under this section is obtainable for the examination of a witness upon the following conditions:

(1) If he resides in a remote part of the Province of Ontario, and at a great distance from the place of trial, and in addition, if it is made *clearly* to appear that the attendance of the witness cannot be procured.

(2) That the witness so residing in a remote part of the Province, the expense of his attendance would be out of proportion to the amount involved in the action, or would be so great that the party desiring his attendance should not, under the circumstances, be required to incur the same. The words "in a remote part of the Province" are of relative import. No definite meaning can be given to them. They must be construed in relation to the circumstances of the case. Mere distance would not govern. That eminent lexicographer, Worcester, defines "remote" as "distant in place, time or connection: far; far off; not near; not nigh." The residence of a witness may under this section be considered "remote" from the place of trial although the actual distance may not be great. It may and frequently does depend on the season of the year, the accessibility at the particular time by steamboat, railway, or other means of

conveyance. What in the winter season may be considered "remote" may not be so in summer time. During the winter season Sault Saint Marie may be "remote" from Owen Sound, Meaford, or Southampton, but in the summer season it is not so. These places are, as a matter of fact, more accessable in the summer season to people living in Sault Saint Marie than many places within the jurisdiction of the Judge of the District of Algoma. So that remoteness must not be decided with reference to distance alone. The season of the year at which the Court is to be held, the accessibility to the place of trial, the facilities of travel by rail or steamboat, the expense which the witnesss would be put to, the time of his absence from home, the convenience of travel to and from the place of trial, would all come within what Worcester has defined remoteness to be, something "distant in place, time or connection." The same may be said of the expression "great distance from the place of the trial." It is an expression which must be considered and construed *relatively*. Like "gross" negligence it is simply "remoteness" after all: See *Wilson* v. *Brett*, 11 M. & W. 113: *Beal* v. *South Devon Ry. Co.*, 3 H. & C. 337; *Grill* v. *General Iron Screw Co.*, L. R. 1 C. P. p. 612. No general rule of construction can be applied, and he that construes it best must do so in the light of these many circumstances which surround most cases, and not by any arbitrary rule of construction to be gained from decided cases on some other Statutes with different objects and purposes. If the Judge determines that under all the circumstances the witness does reside in a remote part of the Province, and at a great distance from the place of trial, he has next to consider:—

(1) Whether it is made clearly to appear that the attendance of the witness cannot be procured, or;

(2) Whether the expense of the attendance of the witness would be out of proportion to the amount involved in the action, or;

(3) Would be so great that the party securing his attendance should not under the circumstances be required to incur the same.

If the Judge, having settled the first proposition in favor of the applicant, determines either one of these last two propositions in the affirmative, then the order should be made.

The writer does not consider it necessary to give Forms of proceedings under this section. Any party applying can readily change the Forms given in the notes to the next previous section so as to adapt them to an application under this section. The first four paragraphs of the Form of Affidavit, in the notes to section 18, may be given entire and then such facts must be stated in the subsequent paragraphs as shew that the witness resides in a remote part of the Province and at a great distance from the place of trial. The affidavit must also shew "*clearly*" that the attendance of the witness cannot be procured, or that the expense of his attendance

would be out of proportion to the amount involved in the action, or would be so great that the party applying for the order should not under the circumstances be required to incur the same.

The notice of motion will require only a slight change.

The Form of Order above given can nearly be used *verbatim*, making such changes however in the number of the section and otherwise as the circumstances of the case require.

It will be observed that the proceedings under this section and the order as to costs shall be the same as in the case of an order under section 18. What the writer therefore has said in the notes to that section, will so far as these matters are concerned, be equally applicable to an application under this section.

This and the 18th section must not be construed as an enlargement of the provisions of the 104th section of the Division Courts Act in regard to affidavit evidence. They are not so, but are intended to make special provision for taking the evidence of witnesses in the particular cases pointed out by the Statute. The evidence must be duly taken according to the provisions of section 18, and cannot be received in the form of an *ex parte* deposition. These two sections are intended to facilitate the taking of evidence and to save expense, but must not be construed as enlarging the rules of evidence beyond the express enactment of the Statute. It is the Common Law right of every party to have the witnesses of his adversary brought into Court and subjected to the truth-giving process of cross-examination. He cannot be deprived of that right except by Statutory declaration. When that right is taken away by the legislature, as it has in a measure by the 99th section of the Division Courts Act (Sinclair's D. C. Act, 128) and these sections, its extent can only be measured by the exact language to be found in the Statutory enactment. As remarked by Draper, C. J., in the oft-quoted case of *Kraemer* v. *Gless*, 10 C. P. at page 475: "It is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give." See also *Carlisle* v. *Tait*, 7 App. R. p. 31; *Horner* v. *Kerr*, 6 App. R. p. 34. The evidence must be taken and returned, and may be used in the same manner as under section 18. In cases where the attendance of the witness clearly could not be procured, as through age, infirmity, accident or otherwise, an application could be made under this section *provided* the witness resided in a remote part of the Province and at a great distance from the place of trial. A reasonably strong case should be made out to warrant the Judge in making this order.

As will be observed by the 2nd sub-section the person appointed to take the evidence is thereby given authority to administer the oath to the person examined under this section.

20. Any defendant who has filed a notice of defence in any action may, by notice in writing to the Clerk, at least six days before the sittings at which the same may be tried, withdraw such defence, and consent that judgment be entered against him for any amount, and the Clerk shall immediately notify the plaintiff thereof by mail, and thereupon the plaintiff shall be entitled to have judgment entered by the Clerk as by default for such amount, and the costs necessarily incurred. Withdrawal of defence.

Provision is here made for withdrawal of a defence. If a defence has been fraudulently entered for the mere purpeose of gaining time, the defendant having no defence to the action, the plaintiff may in cases on special summons obtain judgment under the 4th section of the Division Courts Amendment Act of 1885.—Sinclair's D. C. Law, 1885, pages 78-130. But this is the first Statutory provision which has been made for the withdrawal of a defence. It will be observed that notice *in writing* may be given to the Clerk of the Court "at least six days" before the sittings at which the cause is to be tried, withdrawing the defence.—Sinclair's D, C. Law, 1885, pages 17, 197. This time is to be reckoned as clear days; excluding the day of giving the notice and the day of the sittings. For instance, a notice given on the 1st of any month for the 7th of the same month would be one day too late. *R.* v. *The Justices of Shropshire*, 8 A. & E. 173; *Mitchell* v. *Foster*, 9 Dowl. 527; *R.* v. *Aberdare Canal Co*, 14 Q. B. 854; *R.* v. *Justices of Middlesex*, 9 Jur. 758; Sinclair's D. C. Law, 1885, pages 108, 109, and if the last day should fall on a Sunday it would be reckoned as one of the six days: Sinclair's D. C. Law, 1885, page 21, and cases there cited.

The withdrawal of defence and consent to judgment may be in these words:

(*Court and Cause.*)

A—— B——, Plaintiff,

v.

C—— D——, Defendant.

I hereby withdraw my defence to this action entered herein, and con-

sent that judgment may be entered against me for the full amount of the plaintiff's claim, (*or for such lesser amount as the case may be.*)

Dated, &c.

C—— D——,
Defendant.

To E—— F——,
Clerk of the Court.

On receipt of this notice by the Clerk of the Court he should *forthwith* notify the plaintiff by mail: Sinclair's D. C. Law, 1885, pages 19 and 20. Upon the Clerk's mailing this notice to the plaintiff the latter would be entitled to have judgment entered by the Clerk, as by default for the amount admitted to be due, together with the costs necessarily incurred. If a lesser sum than the amount claimed by the plaintiff is admitted by the defendant, the plaintiff must determine whether he will accept judgment for that sum or proceed to recover a greater sum at the sittings. If he consents to accept the amount admitted he could not afterwards recover any further sum which he had claimed, unless the terms of the consent did not preclude him from doing so. Should the defendant dispute part only of the plaintiff's claim (Sinclair's D. C. Act, 100) his withdrawal of defence under this section and consent to judgment would apparently entitle the plaintiff to judgment for the full amount claimed and costs.

21. The following provisions shall apply to and in respect of any action brought in a Division Court; Adding parties defendants.

1. The Judge may, at any time after action commenced, upon the application of either party, and upon such terms as may appear to him to be just, order that the name of any party who ought to have been joined in the action as a defendant shall be added as a party defendant.

2. If it shall appear to the Judge, either before or at the trial of any action, that any party ought to be added as a party defendant in order that the Court may settle all rights and questions involved in the action, the Judge may order such person to be added accordingly.

3. Every person whose name is so added as a defendant shall be served with a copy of the writ of summons, the original summons being first properly amended, and the proceedings against any such added defendant shall be deemed to have been commenced from the date of the order making him a party defendant; but if the application to add a defendant be made at the trial, the Judge may make the order in a summary manner, and may dispense with the service of a copy of the summons upon such defendant, if such defendant or his solicitor consent thereto, upon such terms as to costs or an adjournment of the trial, as to the Judge shall appear just. Service on parties added.

4. Any two or more persons claiming, or being liable as co-partners may sue, or be sued in the Service on partners.

name of the respective firms, if any; where partners are sued in the name of their firm, the summons may be served on one or more of the partners and subject to the provisions in the next two sections contained, such service shall be deemed good service upon the firm; but the affidavit of the service of the summons shall state the name of the partner served. Any party may, at any time before or after judgment, apply to the Judge for an order directing a statement to be furnished of the names of all the persons who are co-partners in any firm which is a party to the action by the firm named.

Execution against partners.

5. Where a judgment is against partners in the name of the firm, execution may issue in the manner following:—

(*a*) Against any goods of the partners.

(*b*) Against the goods of any person who has admitted in the notice of dispute or defence filed that he is or who has been adjudged a partner.

(*c*) Against any person who has been served as a partner with a copy of the summons and who has failed to appear.

Adding partners as defendant

6. Upon the trial of an action against a firm, if the plaintiff is desirous of obtaining a judgment against the individual partners, other than the one served with a copy of the summons, and in addition to his judgment against the firm, he may procure the addition of the remaining partners as defendants under sub-sections 1 and 3 of this section and thereafter proceed to judgment against them in the action as in other cases.

Before this provision was made there appeared to be no power in cases

in the Division Court to add a party defendant: Sinclair's D. C. Act 263; *Building and Loan Ass.* v. *Heimrod*, 19 L. J. N. S. 254; *Barber* v. *Bingham*, 20 L. J. N. S. 65. Now, if the Judge considers that it is necessary for the purpose of settling all rights and questions involved in the action that any person or persons (R. S. O., chapter 1, section 8, sub-section 23), should be added as defendant or defendants, it is his imperative duty to make all necessary amendments for the purpose: Sinclair's D. C. Law, 1884, pages 65-68.

The summons should first be properly amended if the application is made before the trial, and such application allowed. In such case the summons must be served on the added defendant and he would have the same rights of defence and time therefor that he would have had if the action had been commenced against him on the day the Judge's order adding him as a defendant was made. Should there be no application made before the trial, but the order was applied for at the trial, the Judge could make the order in a summary manner and dispense with service of the summons on the defendant so added, provided he or his solicitor should consent thereto. The costs of amendment and postponement of the trial are left in the discretion of the Judge. A defendant could not properly be added on an *ex parte* application: *Tildesley* v. *Harper*, 3 Ch. D. 277. An administrator or executor of one of several defendants could be added: *Ashley* v. *Taylor*, 10 Ch. D. 768. The object of the Statute is that "all rights and questions involved in the action should be settled."

Another important provision is made in this section in respect to the rights of action for and against partners as such. This provision has been taken from Rule 13 of the English County Court Rules of 1886. Under sub-section 4 of this section partners may sue or be sued in their firm name. It is not imperative on a plaintiff, but permissive to sue a partnership in the name of the firm. There are reasons why in many cases it may not be advisable for a plaintiff to do so. He may not wish to pursue the remedies against a partnership that the law points out. He may prefer to proceed against them individually as defendants as before: Sinclair's D. C. Law, 1885, page 52.

It will be observed that where partners are sued in the name of their firm the summons may be served on one or more of the partners, following O. J. Act, Rules 40 and 346. It is declared that such shall be deemed good service on the firm, subject to the provisions of the next two sections.

The affidavit of service of summons must state the name of the partner or partners served.

Provision is here made that any party to the cause may at any time either before or after judgment, apply for and obtain an order for a statement to be furnished of all the persons who are co-partners in any firm which is a party either as plaintiff or defendant to the action by the firm named. It is submitted that notwithstanding *Pollexfen* v. *Sibson*, 16

Q. B. D. 792, a member of a foreign firm could not be served in this Province so as to bind the firm under this section: Sinclair's D. C. Law, 1884, page 21.

A firm *as such* cannot be garnished. The attachment of the debt should be against the individual members of the firm: *Walker* v. *Rooke*, 6 Q. B. D. 631.

The 5th sub-section provides how execution may issue on a judgment against partners in the name of the firm. It has evidently been taken from the English County Court Rules of 1886, Order XXV, Rule 8 and Rule 346 O. J. Act. The action being against a firm, the goods of the firm are first made answerable for the debt. This follows the rule as to the equitable liquidation of partnership debts. Next, the goods of any person who has admitted in the notice of dispute or defence that he is a partner or has been adjudged a partner are made subject to the partnership debt, in effect rendering the separate goods of such several partners liable with the goods of the firm. Lastly, the goods of any person who has been served as a partner with a copy of the summons and did not appear, and against whom judgment passed by default are also liable.

The 6th sub-section of section 21 has in a measure been taken from Order III., Rule 15, of the English County Court Rules of 1886. It has been adapted to our Division Court practice. Many reasons may be suggested why a plaintiff may desire to have a remedy against the individual members of a firm instead of a remedy against the firm as such. Where the action is brought against a partnership firm, in the name of the firm, the judgment must be against the firm, and it cannot be separately entered against an individual member of the firm who has neither been served nor defended the action: *Jackson* v. *Litchfield*, 8 Q. B. D. 474; *Adam* v. *Townend*, 14 Q. B. D. 103. If the plaintiff desires a judgment against all the partners individually, though having brought his action against them as a firm, he may amend his summons by adding the partners not served as defendants, and having each served as provided for under sub-section 3 of this section. On this being done, he may proceed *to judgment* against them as if they had originally been made defendants. This sub-section does not proceed to declare what the rights of the parties in such case are *after* judgment. It is submitted that while in an action against a firm *as such*, the proceedings after judgment are not so much of a personal character, but more against the property of the firm; the addition of the names of the separate members of such firm under this sub-section, and proceedings duly taken to judgment against them, as well as against the firm, would give all remedies against such added defendants as if originally sued separately. A judgment against a firm would, it is submitted, subject any member of the firm to a judgment summons: See Sinclair's D. C. Act, 189 and following pages; *Taylor* v. *Cook*, 11 P. R. 60.

It will be observed that in this proceeding the only persons who can

be added as defendants individually are those "other than the one served with a copy of the summons."

A judgment may more easily be obtained against a firm than against its individual members, but, the writer has to express a preference for the latter. It is submitted that it will be found more advantageous.

The remedy by execution appears to be two fold. *First*, against the goods of the firm as such. *Secondly*, against the separate goods of those members of the firm who may be brought within the provisions of sub-section 5 (*a*) and (*b*).

FORM OF AFFIDAVIT OF SERVICE OF SUMMONS ON PARTNERSHIP FIRM.

(*Court and Cause.*)

[*The formal parts of the Affidavit will be the same as at pages 323, 324 of Sinclair's D. C. Act. It will then proceed thus*:

That I did on the day of A. D. 18 , duly serve the above named partnership firm, the defendants in this cause, with &c. (*as in Forms 106 or 107, Sinclair's D. C, Act, 323, according to the nature of the summons*), by delivering the same personally (*or as the case may be*), to K. L., who then was a partner in the said firm, (*then proceed to the close as in ordinary affidavits of service.*)

DEMAND FOR STATEMENT OF NAMES AND PLACES OF RESIDENCE OF PERSONS CONSTITUTING PLAINTIFFS' FIRM

(*Court and Cause.*)

Sir,—

On behalf of the above named defendant E. F., I require of you forthwith to declare to me in writing the names of all persons who are partners in the firm of A. B. & Co., the above named plaintiffs, pursuant to the 21st section of the Division Courts Amendment Act, 1886.

Dated, &c.

Yours, &c.,

M. N.,

Solicitor (or Agent) for the Defendant E. F.

To Mr. X. Y.,

the Plaintiff's Solicitor (or Agent), (*or as the case may be.*)

DECLARATION IN ANSWER THERETO.

(*Court and Cause.*)

Sir,—

The names and places of residence of all the persons constituting the firm of A. B. & Co., the above named plaintiffs are as follows:

A. B., who resides at, &c.

G. H., who resides at, &c.

L. M., who resides at, &c.

Dated, &c.

Yours, &c.,

X. Y.,

Plaintiff's Solicitor (or Agent.)

To Mr. M. N.,

Solicitor (or Agent) for the Defendant E. F.

FORM OF NOTICE OF APPLICATION FOR ORDER FOR NAMES OF MEMBERS OF FIRM, &c.

(*Court and Cause.*)

Sir,—

Take notice that a motion will be made on behalf of the above named defendant to the Judge of this Court, at his Chambers in the Court House, in the City of Hamilton (*or as the case may be*), on the day of 18 , at ten o'clock in the forenoon, or so soon thereafter as the motion can be heard, for an order under the 21st section of the Division Courts Amendment Act, 1886, directing a statement to be furnished to me of the names of all the persons who are co-partners in the firm of A. B. & Co., the above named plaintiffs. That on such application will be read the affidavits of , copies of which are hereto annexed.

Dated, &c.

Yours, &c.,

M. N.,

Solicitor (or Agent) for the Defendant E. F.

To Mr. X. Y.,

the Plaintiff's Solicitor (or Agent) (*as the case may be.*)

FORM OF ORDER FOR STATEMENT OF THE NAMES OF ALL THE PERSONS WHO ARE CO-PARTNERS IN THE PLAINTIFFS' FIRM.

(*Court and Cause.*)

Date, &c.

Upon the application of the above named defendant in this cause, and upon reading the affidavit of service of demand herein, and of (*if any other affidavit filed*) and upon hearing the parties by their solicitors (*or* agents);

It is ordered that the above named plaintiffs do within days of the service of this order furnish to the defendant, his solicitor or agent, a statement of the names of all the persons who are co-partners in the firm of A. B. & Co., the above named plaintiffs.

It is further ordered, that the costs of this application shall be costs in the cause (*or as the case may be.*) (*Any other terms may be here added.*)

JUDGE.

[*A previous demand would not be absolutely necessary to the application, but the writer advises it to be made:* FIRST, *as a matter of courtesy and to save the trouble of an application if the demand should be complied with;* SECOND, *to subject the opposite party, in the discretion of the Judge, to the costs of the application, if the demand was not complied with. This section does not say anything about the costs of the application, but the Judge would have power over them as "a proceeding not otherwise provided for" under section 154 of the Division Courts Act: Sinclair's D. C. Act, 171. In analogy to other cases the Judge might possibly impose costs on a party refusing to furnish the required information or make them costs in the cause. To have made this section complete a penalty should have been allowed to be imposed by the Judge for default in furnishing the required information. What can be done if not furnished does not seem clear.*]

FORM OF JUDGMENT AGAINST A FIRM, &c.

Judgment for the plaintiff against the said Firm of A. B. & Co., and also against O. P., the partner thereof served with the copy of summons herein, and who has failed to appear (*and if against any person who has admitted in the notice of dispute or defence filed that he is or who has been adjudged a partner, then proceed thus:*) and against Q. R., who has by his notice of dispute filed herein, admitted that he is a partner, and S. T., who is hereby adjudged a partner of the said firm; for $ and $ costs, to be paid forthwith (*or as the case may be.*)

[*The above Form may be more specific than there is any necessity for, but the writer thinks it is better to err on the side of safety. With the above judgment before him the Clerk will have no difficulty in determining against whom execution should issue.*]

Act to be read with R. S. O. c. 47.

22. This Act shall be read and construed as part of *The Division Courts Act*, and of any Acts amending the same.

This section incorporates this Act with all other Division Court Acts, thereby making it as much a part of them as if it had originally been part of Division Court legislation.

"Every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything which the Legislature deems to be for the public good, or to prevent or punish the doing of anything which it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning and spirit." Interpretation Act—Rev. Stat Ont. Chapter 1, section 8, sub-section 38.

All Division Court Acts must be read as a whole, and their apparent inconsistencies harmonized, and their variances, if any, reconciled in all cases, with a view of promoting justice and right and preventing the commission of wrong. "Where the language of an Act of Parliament will admit of two constructions, if one of them would lead to harshness or injustice, we may fairly infer that the other will give effect to the intention of the legislature, and adopt it in preference" *Per* Williams, J., in *Whiley* v. *Whiley*, 4 C. B. N. S., p. 661.

23. This Act may be cited as "*The Division Courts Amendment Act, 1886.*" Short title

The Division Court Statutes of general jurisdiction hitherto in force will be found to be the following:

(1) Revised Statutes of Ontario, (Chapter 47.)

(2) 43 Victoria, Chapter 8, (Ontario.)

(3) 47 Victoria, Chapter 9, (Ontario.)

(4) 48 Victoria, Chapter 14, (Ontario.)

For the views of the writer on the several clauses of these Statutes the reader is referred to the several works which he has published on the subject of Division Court Law. After a more extended experience in the administration of law in Division Courts, the writer has to reiterate the opinions which he ventured to express on the many questions which had to be discussed in the absence of authority, and sees no reason in after years materially to change the many views which he formerly expressed.

AN ACT TO AMEND THE ACT RESPECTING ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

49 Victoria, Chapter 25 (Ontario.)

[*See Sinclair's D. C. Law, 1885, 256-262.*]

[*Assented to 25th March, 1886.*]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

48 V. c. 26, s. 3 amended.

1. Sub-section 2, of section 3, of *The Act Respecting Assignments for the Benefit of Creditors* is amended by adding to the said sub-section the following words :—

Certain assignments to be valid.

"Nor shall anything herein contained affect any payment of money to a creditor, where such creditor by reason or on account of such payment, has lost or been deprived of, or has in good faith given up, any valid security which he held for the payment of the debt so paid, unless the value of the security is restored to the creditor.

"Nor shall anything herein contained invalidate a security given to a creditor for a pre-existing debt where by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor, in the *bona fide* belief that the advance will enable the debtor to continue his trade or business, and to pay his debts in full."

48 V. c. 26 s. 9 amended.

2. Section 9 is amended by adding thereto the following words, "subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands, or to the lien, if any of the creditor for his costs who has the first execution in the sheriff's hands."

48 V. c. 26 s. 12 amended.

3. Section 12 of the said Act is amended by adding thereto the following sub-section :

(3) In provisional judicial districts, and territorial districts, and in the temporary judicial district of Nipissing, the counterpart or copy of the assignment shall be filed in the same office and within the same time respectively, as mortgages and other instruments are directed to be filed in such districts, under the provisions of sections 17, 18 and 19, of *The Act respecting Mortgages and Sales of Personal Property*, and the clerk shall perform the same duties and have the same fees as clerks acting under sub-section 2 of the said section 12.

Estate to vest in assignee.

4. Where a new assignee is appointed under the said Act the estate shall forthwith vest in him without conveyance or transfer. The new assignee may register an affidavit of his appointment in the office in which, under the said Act or under any Act passed during the present session, the

original assignment was filed, such an affidavit may also be registered under *The Registry Act*. The registration of the affidavit under *The Registry Act* shall have the same effect as the registration of a conveyance.

48 V. c. 26, s. 12, amended.

5. Section 12 of the said Act is hereby amended by inserting the words: "at least once" after the word: "published" in the sixth line thereof, and by striking out the words "and the publication in each shall be continued therein for at least four times," where the same occur at the end of the said section and substituting therefor the words: "not less than twice."

Accounts to be prepared by assignee.

6. Upon the expiration of one month from the first meeting of creditors, or as soon as may be after the expiration of such period and afterwards from time to time at intervals of not more than three months, the assignee shall prepare and keep constantly accessible to the creditors accounts and statements of his doings as such assignee, and of the position of the estate; and he shall declare dividends of the estate whenever the amount of money in his hands will justify a division thereof, and also whenever he is required by the inspectors.

Notice of dividend sheet.

7. So soon as a dividend sheet is prepared, notice thereof shall be given by letter posted to each creditor, inclosing an abstract of receipts and disbursements, shewing what interest has been received by him for moneys in his hands, together with a copy of the dividend sheet, noting thereon the claims objected to, and stating whether any reservation has or has not been made therefor; and after the expiry of eight days from the day of mailing such notice, abstract and dividend sheet as aforesaid, dividends on all claims not objected to within that period shall be paid.

AN ACT TO AMEND THE REVISED STATUTE RESPECTING MASTER AND SERVANT.

49 Victoria, Chapter 37 (Ontario.)

[*Assented to 25th March, 1886.*]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows :—

R. S. O. c. 133, s. 8, repealed

1. Section 8 of chapter 133 of the Revised Statutes of Ontario is hereby repealed and the following substituted therefor :—

Agreements made with residents out of Ontario for service therein to be void

8. Any agreement or bargain, verbal or written, express or implied, which may hereafter be made between any person and any other person not a resident of Canada, for the performance of labour or service, or having reference to the performance of labour or service, by such other person in the Province of Ontario, and made as aforesaid, previous to the migration or coming into Canada, of such other person whose labour or service is contracted for, shall be void and of no effect, as against the person only so migrating or coming.

Application of Act limited.

2. Nothing in this Act shall be so construed as to prevent any person from engaging under contract or agreement skilled workmen, not resident in Canada, to perform labour in Ontario in or upon any new industry not at present established in Ontario, or any industry at present established if skilled labour for the purpose of the industry cannot be otherwise obtained; nor shall the provisions of this Act apply to teachers, professional actors, artists, lecturers or singers.

AN ACT TO SECURE COMPENSATION TO WORKMEN IN CERTAIN CASES.

49 Victoria, Chapter 28 (Ontario.)

[*Assented to 25th March, 1886.*]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Short title

1. This Act may be known and cited as "*The Workmen's Compensation for Injuries Act, 1886.*"

Interpretation.

2. Unless otherwise declared or indicated by the context, wherever any of the following words or expressions occur in this Act, they shall have the meanings hereinafter expressed, that is to say:

"Person."

1. The expression "person who has superintendence entrusted to him" means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour.

"Employer."

2. The expression "employer" includes a body of persons corporate or unincorporate.

"Workman."

3. The expression "workman" does not include a domestic or menial servant, but, save as aforesaid, means any railway servant, and any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years, or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour.

"Packing."

4. The word "packing" shall mean a packing of wood or metal, or some other equally substantial and solid material, of not less than two inches in thickness, and which, where filled in, shall extend to within one and a-half inches of the crown of the rails in use on any railway, shall be neatly fitted so as to come against the web of such rails, and shall be well and solidly fastened to the ties on which such rails are laid.

When workman to have claim against employer

3. Where, after the commencement of this Act, personal injury is caused to a workman—

1. By reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer; or

2. By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or

3. By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed; or

4. By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

5. By reason of the negligence of any person in the service of the employer who has the charge or control of any signal-points, locomotive, engine, or train upon a railway;

the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work.

Injuries by railways.

4. Where within this Province personal injury is caused to a workman employed on or about any railway,

1. By reason of the lower beams or members of the superstructure of any highway, or other overhead bridge, or any other erection or structure over said railway, not being of a sufficient height from the surface of the rails to admit of an open and clear headway of at least seven feet between the top of the highest freight cars then running on such railway, and the bottom of such lower beams or members; or,

2. By reason of the space between the rails in any railway frog, extending from the point of such frog backward to where the heads of such rails are not less than five inches apart, not being filled in with packing; or,

3. By reason of the space between any wing-rail and any railway frog, and between any guard-rail and any other rail fixed and used alongside thereof as aforesaid, and between all wing-rails where no other rail intervenes, (save only where the space between the heads of any such wing-rail and railway frog as aforesaid, or between the heads of any such guard-rail and any other rail fixed and used alongside thereof as aforesaid, or between the heads of any such wing-rails where no other rail

intervenes as aforesaid, is either less than one and three-quarters of an inch or more than five inches in width), not being at all times during every month of April, May, June, July, August, September and October, filled in with packing; such injury shall be deemed and taken to have been caused by reason of a defect within the meaning of sub-section 1 of section 3 of this Act. But nothing in this section contained shall be taken or construed, as in any respect, or for any purpose restricting the meaning of said sub-section.

Exceptions to preceding provisions.

5. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases, that is to say:

1. Under sub-section 1 of section 3, unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition.

2. Under sub-section 4 of section 3, unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned; provided, that where a rule or by-law has been approved, or has been accepted as a proper rule or by-law, either by the Lieutenant-Governor in Council, or under and pursuant to any provision in that behalf of any Act of the Legislature of Ontario, or of the Parliament of Canada, it shall not be deemed for the purposes of this Act to be an improper or defective rule or by-law.

3. In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give or cause to be given information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

Limit of amount of compensation.

6. The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury of a person in the same grade employed during those years in the like employment within this Province: and such compensation shall not be subject to any deduction or abatement by reason, or on account, or in respect of any matter or thing whatsoever, save such as is specially provided for in section 9 of this Act."

Limit of time for recovery of compensation.

7 An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within twelve weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of

death within twelve months from the time of death; provided always that in case of death the want of such notice shall be no bar to the maintenance of such action, if the judge shall be of opinion that there was reasonable excuse for such want of notice.

Contract by workman not to constitute a defence to action for compensation

8. No contract or agreement made or entered into by a workman shall be a bar or constitute any defence to an action for the recovery under this Act of compensation for any injury.

1. Unless for such workman entering into or making such contract or agreement there was other consideration than that of his being taken into or continued in the employment of the defendant; nor
2. Unless such other consideration was in the opinion of the court or judge before whom such action is tried, ample and adequate; nor
3. Unless, in the opinion of said court or judge, such contract or agreement, in view of such other consideration was not on the part of the workman, improvident, but was just and reasonable;

and the burthen of proof in respect of such other consideration, and of the same being ample and adequate, as aforesaid, and that said contract was just and reasonable and was not improvident as aforesaid, shall, in all cases, rest upon the defendant; provided always that notwithstanding anything in this section contained, no contract or agreement whatsoever made or entered into by a workman shall be a bar or constitute any defence to an action for the recovery under this Act of compensation for any injury happening or caused by reason of any of the matters mentioned in section 4 of this Act,

Money payable under penalty to be deducted from compensation.

9. There shall be deducted from any compensation awarded to any workman or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this Act, any penalty or damages, or part of a penalty or damages which may in pursuance of any other Act, either of the Parliament of Canada, or of the Legislature of Ontario, have been paid to such workman, representatives or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or damages, or part of a penalty or damages under any such Act, either of the said Parliament, or of the said Legislature, in respect of the same cause of action, such workman, representatives or persons shall

not, so far as the said Legislature has power so to enact, be entitled thereafter to receive in respect of the same cause of action, any such penalty or damages, or part of a penalty or damages, under any such last-mentioned Act.

Form and service of notice of injury.

10.—(1) Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer. or if there is more than one employer, upon one of such employers.

(2) The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

(3) The notice may also be served by post, by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.

(4) Where the employer is a body of persons corporate or unincorporate the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or if there be more than one office, any one of the offices of such body.

(5) A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the Judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

(6) A notice under this section shall be deemed sufficient if in the form or to the effect following:—

To A. B., of (*here insert employer's address*)
or To the Company, (*or as the case may be.*)

Take notice, that on the day of 188 C. D., of (*insert address of injured person*) a workman in your employment sustained personal injury, (*add*, of which he died, *if such be the case,*) and that such injury was caused by (*state shortly the cause of injury, e.g., the fall of a beam*)

(Date.)

Yours, etc.,

X. Y.

Particulars of demand.

11. In any action brought under this Act the particulars of demand or statement of claim shall state in ordinary language the cause of the injury, and the date at which it was sustained, and the amount of compensation claimed; and where the action is brought by more than one plaintiff, the amount of compensation claimed by each plaintiff, and where the injury of

which the plaintiff complains shall have arisen by reason of the negligence, act, or omission of any person in the service of the defendant, the particulars shall give the name and description of such person.

Appointment of Assessors.

12.—(1) Upon the trial of any action for recovery of compensation under this Act before a Judge without a jury, one or more assessors may be appointed by the Court or Judge for the purpose of ascertaining the amount of compensation, and the remuneration (if any) to be paid to such assessors shall be fixed and determined by the Judge at the trial.

(2) Any person who shall, as hereinafter provided, be appointed to act as an assessor in such action, shall be qualified so to act.

(3) In any such action, a party who desires assessors to be appointed shall, ten clear days at least before the day for holding the Court at which the action is to be tried, file an application stating the number of assessors he proposes to be appointed, and the name, addresses and occupations of the persons who may have expressed their willingness in writing to act as assessors. If the applicant has obtained the consent of the other party to the persons named being appointed, he shall file such consent with his application.

(4) Where the application for the appointment of assessors has been made by one party to an action only, he shall, eight clear days at least before the day for holding the Court at which the action is to be tried, serve a copy of the application, so filed, upon the other party, who may then either file an application for assessors, or file objections to one or more of the persons proposed.

(5) An application for the appointment of assessors may be in the form following, or to the like effect, namely :—

In the (*describing the Court*)

"The Workmen's Compensation for Injuries Act, 1886."

BETWEEN, Plaintiff,
Defendant.

The plaintiff (*or* defendant) applies to have an assessor (*or* assessors) appointed to assist the Court in ascertaining the amount of compensation to be awarded to the plaintiff, should the judgment be in his favour, and he submits the names of the following persons, who have expressed their willingness in writing to act as assessors should they be appointed.

(*Here set out the names, addresses and occupations of the persons above referred to.*)

(*If the other party consents to the appointment add the following*):—

The defendant (*or* plaintiff) consents to the appointment of any of the persons above named to act as assessors in this action, as appears by his consent thereto filed herewith.

Dated this day of

A. B.

The above named plaintiff, (*or as the case may be.*)

(6) Where separate applications are filed by the parties, no objection to the persons proposed shall be made by either party, but the Court or Judge may appoint from the persons named in each application one or more assessor or assessors, provided that the same number of assessors be appointed from the names given in such applications respectively.

(7) In any such action brought in a Division Court the applications for the appointment of assessors, together with any objections made to the persons proposed, shall be forwarded by the Clerk of the Court to the Judge.

(8) Where application for the appointment of assessors is granted, the Court or Judge shall appoint such of the persons proposed for assessors as by the Court or Judge may be deemed fit, subject to the provisions contained in this Act.

(9) In any such action where an application for the appointment of assessors has been filed, the Court or Judge may, at any time prior to the trial thereof, nominate one or more additional persons to act as assessors in the action. Where no application for assessors has been made, the Court or Judge may appoint any one or more persons to act as assessor or assessors in the action before or on the trial of the action.

(10) If at the time and place appointed for the trial all or any of the assessors appointed shall not attend, the Court or Judge may either proceed to try the action with the assistanee of such of the assessors, if any, as shall attend, or may adjourn the trial generally, or upon any terms which the Court or Judge may think fit, or may appoint any person who may be available and who is willing to act, and who is not objected to, or who, if objected to is objected to on some insufficient ground, or the Court or Judge may try the action without assessors.

(11) Every person requiring the Court or Judge to be assisted by assessors shall at the time of filing his application deposit therewith the sum of $4 for each assessor proposed, and such payments shall be considered as costs in the action, unless otherwise ordered by the Court or Judge: Provided, that where a person proposed as an assessor shall have in writing agreed and consented that he will not require his remuneration to be so deposited, no deposit in respect to such person shall be required.

(12) Where an action shall be tried by the Court or Judge with the assistance of any assessors in addition to or independently of any assessors proposed by the parties, the remuneration of such assessors shall be borne by the parties, or either of them, as the Judge or Court shall direct.

(13) If after an assesser has been appointed the action shall not be tried, the Court or Judge shall have power to make an allowance to him in

respect of any expense or trouble which he may have incurred by reason of his appointment, and direct the payment to be made out of any sum deposited for his remuneration.

(14) The assessors shall sit with and assist the Court or Judge when required with their opinion and special knowledge for the purpose of ascertaining the amount of compensation, if any, which the plaintiff shall be entitled to recover.

Consolidation of actions.

13.—(1) Where several actions shall be brought under this Act against a defendant in the same Court in respect of the same negligence, act or omission, the defendant shall be at liberty to apply to the Judge that the said actions shall be consolidated.

(2) Applications for consolidation of actions shall be made upon notice to the plaintiffs affected by such consolidation.

(3) In case several actions shall be brought under this Act against a defendant in the same Court in respect of the same negligence, act or omission, the defendant may, on filing an undertaking to be bound so far as his liability for such negligence, act or omission is concerned by the decision in such one of the said actions as may be selected by the Court or Judge, apply to the Court or Judge for an order to stay the proceedings in the actions other than in the one so selected, until judgment is given in such selected action.

(4) Applications for stay of proceedings shall be made upon notice to the plaintiffs affected by stay of proceedings or *ex parte*.

(5) Upon the hearing of any application for consolidation of actions or for stay of proceedings, the Court or Judge shall have power to impose such terms and conditions and make such order in the matter as may be just.

(6) If any order shall be made by a Court or Judge upon an *ex parte* application to stay proceedings, it shall be competent to the plaintiffs affected by such order to apply to the Court or Judge (as the case may be) upon notice or *ex parte*, to vary or discharge the order so made, and upon such last-mentioned application such order shall be made as the Court or Judge shall think fit, and the Court or Judge shall have power to dispose of the costs occasioned by such order or orders as may be deemed right.

(7) In case a verdict in the selected action shall be given against the defendant, the plaintiffs in the actions stayed shall be at liberty to proceed for the purpose of ascertaining and recovering their damages and costs.

(8) A defendant may by notice to the opposite party to be given or served at least six days before the day appointed for the trial of action, admit the truth of any statement of his liability for any alleged negligence,

act or omission as set forth or contained in the plaintiff's statement or particulars of claim in the action, and after such notice given the plaintiff shall not be allowed any expense thereafter incurred for the purpose of proving the matters so admitted.

(9) Where two or more persons are joined as plaintiffs under subsection 1 of this section, and negligence, act or omission which is the cause of action shall be proved, the judgment shall be for all the plaintiffs, but the amount of compensation, if any, that each plaintiff is entitled to shall be separately found and set forth in the judgment, and the amount of costs awarded in the action shall be ordered to be paid to such person, and in such manner as the Court or Judge may think fit; should the defendant fail to pay the several amounts of compensation and the costs awarded in the action, execution may issue as in an ordinary action, and should the proceeds of the execution be insufficient, after deducting all costs, to pay the whole of the amounts awarded, a dividend shall be paid to each plaintiff, calculated upon the proportion of the amount which shall have been awarded to the respective plaintiffs to the total amount realized after the deduction of all the costs of the action as aforesaid.

Computation of time.

14. Where the time for doing any act, taking any proceeding, or giving any notice under or required by this Act expires on a Sunday such act, or proceeding, or notice shall, so far as regards the time of doing, taking or giving the same, be held to be duly and sufficiently done, taken or given, if done, taken or given, on the day next following such Sunday.

Forms and rules.

15. In any action brought in any Court to recover compensation under this Act, the forms and methods, and the rules and orders in force in Court shall, subject to and save as otherwise provided by the terms and provisions of this Act, apply to and regulate all matters of pleading, practice and procedure in such action, and notwithstanding anything in this Act contained, the forms and method, and the pleadings, practice and procedure in any such action shall conform to and be regulated by any rules or orders in that behalf hereafter lawfully and duly made or prescribed with respect to actions brought in any such Court.

Commencement of Act.

16. This Act shall not come into operation until the first day of July next, after the passing hereof which date is in this Act referred to as the commencement of this Act.

Application of Act limited.

17. Whereas certain railway companies, some of which carry on operations partly within the Province and partly without, have, in accordance with the provisions of certain Acts of the Parliament of Canada, established insurance and provident societies or associations to provide and secure, in cases of sickness, accident or death, aid to such of the

employees of the companies as are members of such societies or associations ; and whereas it is desirable that nothing in this Act contained should have the effect of impairing the advantages derivable from any such association, or of making its operations less beneficial to the workmen employed by such companies ; and whereas with a view to enactment of any safe and proper provisions which may be necessary in the premises, it is desirable that time should be afforded for further and more complete inquiry in that behalf: Therefore, it is hereby enacted that, where any railway company or employer has, in accordance with the provisions of any Act of the Parliament of Canada, or otherwise, established an insurance and provident society or association, of which at least two-thirds of the employees of said company or employer shall have become members, and which society or association, shall provide for its members aid in case of sickness, accident or death, to at least the extent and amount provided and secured in that respect by the insurance and provident society or association now established by the Grand Trunk Railway Company, of Canada, in accordance with the provisions of certain Acts of the Parliament of Canada, then and in every such case this Act shall not, until after the lapse of one year from and after the commencement thereof, apply to any such railway company or employer: provided, however, that notwithstanding anything in this section contained, this Act shall be held to apply to every such railway company and employer in respect of any personal injury caused to a workman by reason of any of the matters mentioned in section 4 of this Act, and in respect of any action for the recovery of compensation for any such last mentioned injury.

AN ACT RESPECTING LANDLORDS AND TENANTS AND DISTRESS.

49 Victoria, Chapter 29 (Ontario.)

[*Assented to the 25th March, 1886.*]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

Right of re-entry.

1. In every demise hereafter made or entered into, whether by parol or in writing, unless it shall be otherwise agreed, there shall be deemed to be included an agreement that if the rent reserved, or any part thereof, shall remain unpaid for fifteen days after any of the days on which the same ought to have been paid, although no formal demand shall have been made thereof, it shall be lawful for the landlord, at any time thereafter into and upon the demised premises, or any part thereof, in the name of the whole to re-enter and the same to have again, repossess, and enjoy as of his former estate.

Assignments by persons under disability.

2. Where any person being under the age of twenty-one years, or a lunatic, or person of unsound mind, shall be seized of the reversion of land subject to a lease, and such lease shall contain a covenant not to assign or sublet without leave, the guardian of such infant, or the committee of such lunatic, or person of unsound mind may, with the approbation of the Judge of the Surrogate Court of the county in which the land is situate, consent to any assignment or transfer of such leasehold interest, in the same manner and with the like effect as if the consent were given by a lessor under no disability.

Right of mortgagee to distrain limited.

3. The right of a mortgagee to distrain for interest in arrear upon a mortgage, shall be limited to the goods and chattels of the mortgagor, and as to such goods and chattels, to such only as are not exempt from seizure under execution. This section shall not apply to existing mortgages.

AN ACT TO FURTHER AMEND THE LAW FOR THE PROTECTION OF GAME AND FUR-BEARING ANIMALS.

49 Victoria, Chapter 45 (Ontario.)

[*Assented to 25th March, 1886.*]

Preamble. Whereas it is expedient to amend the law respecting the preservation of game and fur-bearing animals in Ontario;

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

43 V. c. 31, repealed. 1. The Act passed in the 43rd year of Her Majesty's reign, and chaptered 31, is hereby repealed.

Close period 2. None of the animals or birds hereinafter mentioned, shall be hunted, taken or killed, within the periods hereinafter limited;

Deer, etc. 1. Deer, elk, moose, reindeer or caribou, between the fifteenth day of December and the fifteenth day of October;

Grouse, etc. 2. Grouse, pheasants, prairie fowl or partridge, between the first day of January and the first day of September;

Quail and wild turkeys. 3. No quail shall be hunted, taken, or killed, during the years 1886, 1887, and no wild turkeys during the years 1886, 1887, 1888, and in each case thereafter not between the fifteenth day of December and the fifteenth day of October following.

Woodcock. 4. Woodcock, between the first day of January and the fifteenth day of August;

Snipe, rail and plover. 5. Snipe, rail and golden plover, between the first day of January and the first day of September;

Swans and geese. 6. Swans or geese, between the first day of May and the first day of September;

Ducks and other water fowl. 7. Ducks of all kinds, and all other water fowl, between the first day of January and the first day of September;

Hares. 8. Hares, between the fifteenth day of March and the first day of September.

Possession, how far lawful. 3. No person shall have in his possession, any of the said animals or birds, no matter where procured, or any part or portion of any such animals or birds, during the periods in which they are so protected; provided that

Exposure for sale. they may be exposed for sale for fifteen days, and no longer, after such periods, and may be had in possession for the private use of the owner and his family at any time, but in all cases the proof of the time of killing, taking or purchasing, shall be on the person so in possession.

4. No eggs of any of the birds above mentioned shall be taken, destroyed, or had in possession by any person at any time. Protection of eggs.

5. None of the said animals or birds, except the animals mentioned in section 7 of this Act, shall be trapped, or taken by means of traps, nets, snares, gins, baited lines, or other similar contrivances; nor shall such traps, nets, snares, gins, baited lines or contrivances, be set for them, or any of them, at any time; and such traps, nets, snares, gins, baited lines, or contrivances, may be destroyed by any person without such person thereby incurring any liability thereof. Trapping forbidden

6. None of the contrivances for taking or killing the wild fowl, known as swans, geese or ducks, which are described or known as batteries, swivel guns, sunken punts, shall be used at any time, and no wild fowl, known as ducks, or other water fowl, except geese or swan shall be hunted, taken or killed, between the expiration of the hour next after sunset and the commencement of the hour next before sunrise. Batteries, etc., for taking wild fowl forbidden, and night hunting forbidden.

7. No beaver, mink, muskrat, sable, martin, otter, or fisher, shall be hunted, taken or killed, or had in possession of any person between the first day of May, and the first day of November; nor shall any traps, snares, gins, or other contrivances, be set for them during such period; nor shall any muskrat house be cut, speared, broken or destroyed, at any time; and any such traps, snares, gins, or other contrivances so set, may be destroyed by any person without such person thereby incurring any liability therefor: provided that this section shall not apply to any person destroying any of the said animals in defence or preservation of his property. Fur-bearing animals protected. Proviso.

8. Offences against this Act shall be punished upon summary conviction on information or complaint before a justice of the peace, as follows: Penalties.

(*a*) In case of deer, elk, moose, reindeer or caribou, by a fine not exceeding $50, nor less than $10, with costs, for each offence;

(*b*) In case of birds or eggs, by a fine not exceeding $25, nor less than $5, with costs, for each bird or egg;

(*c*) In case of fur-bearing animals, mentioned in section 7 of this Act, by a fine not exceeding $25, nor less than $5, with costs, for each offence;

(*d*) In the case of other breaches of this Act, by a fine not exceeding $25, nor less than $5, with costs.

9. The whole of such fine shall be paid to the prosecutor unless the convicting justice has reason to believe that the prosecution is in collusion with, and for the purpose of benefiting the accused, in which case the said justice may order the disposal of the fine as in ordinary cases. Disposition of penalties.

10. In all cases confiscation of game shall follow conviction, and the Confiscation of game.

game so confiscated, shall be given to some charitable institution or purpose, at the discretion of the convicting justice.

Protection of game preserves.

11. In order to encourage persons who have heretofore imported or hereafter import different kinds of game, with the desire to breed and preserve the same on their own lands, it is enacted that it shall not be lawful to hunt, shoot, kill or destroy any such game without the consent of the owner of the property wherever the same may be bred.

Use of poison prohibited.

12. It shall not be lawful for any person to kill or take, any animal protected by this Act, by the use of poison or poisonous substances, nor to expose poison, poisoned bait or other poisoned substances, in any place or locality, where dogs or cattle may have access to the same.

Deer, game, etc., not to be killed for export.

13.—(1) No person shall at any time hunt, take or kill, any deer, elk, moose, reindeer, or caribou, for the purpose of exporting the same out of Ontario, and in all cases the onus of proving that any such deer, elk, moose, reindeer or caribou, as aforesaid, so hunted, taken or killed, is not intended to be exported as aforesaid, shall be upon the person hunting, killing, or taking the same, or in whose possession or custody the same may be found.

(2) Offences against this section, shall be punished by a fine not exceeding $25, nor less than $5 for each animal.

Hounds not to run at large.

14. No owner of any hound, or other dog known by the owner to be accustomed to pursue deer, shall permit any such hound, or other dog, to run at large in any locality where deer are usually found, during the period, from the fifteenth day of November, to the fifteenth day of October, under a penalty on conviction; of not more than $25, nor less than $5, for each offence; any person harbouring or claiming to be the owner of any such hound or dog shall be deemed the owner thereof.

Appointment of game inspectors.

15. It shall be lawful for the council of any county, city, town, township, or incorporated village, to appoint an officer who shall be known as the game Inspector for such county, city, town, township or incorporated village, and who shall perform such duties in enforcing the provisions of this Act, and be paid such salary, as may be mutually agreed upon.

Duties of Inspector. Seizure of game.

16.—(1) It shall be the duty of every such game Inspector appointed as aforesaid, forthwith to seize all animals or portions of animals in the possession of any person contrary to the provisions of this Act, and to bring the person in possession of the same before a justice of the peace, to answer for such illegal possession.

Prosecutions.

(2) It shall also be the duty of every such game Inspector, to institute prosecutions against all persons found infringing the provisions of this Act, or any of them, and every such Inspector may cause to be opened, or may himself open in case of refusal, any bag, parcel, chest, box, trunk, or recep-

tacle in which he has reason to believe that game killed or taken during the close season, or peltries out of season, are hidden. Search for game.

(3) Every such Inspector, if he has reason to suspect, and does suspect that game killed or taken during the close season, or peltries out of season, are contained or kept in any private house, shed, or other building, shall make a deposition in the Form A annexed to this Act, and demand a search warrant to search such store, private house, shed, or other building, and thereupon such justice of the peace may issue a search warrant according to Form B.

17. This Act shall come into effect on and after the first day of July next after the passing thereof. Commencement of Act.

FORM A.

I, undersigned game Inspector for do hereby declare that I have reason to suspect, and do suspect, that game killed or taken during the close season, *or* furs out of season, etc., etc., (*as the case may be*) are at present held and concealed, (*describe the property, occupant, etc., and the place*).

Wherefore I pray that a warrant may be granted and given to me to effect the necessary searches (*describe here the property, etc., as above*).

Sworn before me at this day of A. D. 18 L. B. J. P.

X. Y. Game Inspector.

FORM B.

Province of Ontario, County of

To each and every the constables of County of

Whereas, Game Inspector for has this day declared under oath before me, the undersigned, that he has reason to suspect that (game, *or* birds killed or taken during the close season, *or* furs out of season, etc., (*as the case may be*) are at present held and concealed, (*describe property, occupant, place, etc.*)

Therefore, you are commanded by these presents in the name of Her Majesty, to assist the said Game Inspector, and to diligently help him to make the necessary searches to find the (*state the birds or game killed or taken during the close season, or furs out of season, etc.,*) which he has reason to suspect and does suspect to be held and concealed in (*describe the property, etc., as above*) and to deliver, if need there be, the said birds, etc., (*as the case may be*) to the said Game Inspector, to be by him brought before me or before any other magistrate to be dealt with according to law.

Given under my hand and seal at County of this day of A. D. 18 L. S.

L. B J. P.

SUMMONS TO PRIMARY DEBTOR (BEFORE JUDGMENT) AND GARNISHEE.

No. A. D., 18 .

In the Division Court in the County of .

[Seal.]

BETWEEN A. B., Primary Creditor,

and

C. D., Primary Debtor,

and

E. F., Garnishee.

The Primary Creditor claims from the Primary Debtor the amount of the annexed account:

(*Giving the Account or Claim in detail.*)

You, the above-named Primary Debtor, are hereby summoned to appear at the sittings of this Court, to be held at on the day of , A. D., 18 , (*or at on the day of A. D., 18 , before the Judge then and there presiding*), to answer the Primary Creditor, who sues you for the recovery of the annexed claim. And you, the Garnishee, are required to appear at the same time and place to state and shew whether or not you owe any and what debt to the Primary Debtor, and why you should not pay the same into Court to the extent of the Primary Creditor's claim, in satisfaction thereof: and take notice, that if any or either of you desire to set up any Statutory or other defence, or any set-off, or to admit the liability of any or either of you, in whole or in part, for the amount claimed in this action, you shall file with the Clerk of this Court *the particulars* of such defence or set-off, or any admission of the amount due or owing by any or either of you, within eight days after service on you respectively of this Summons.

You and all others interested may also shew any other cause why the debt owing from the Garnishee should not be paid and applied to satisfy the said claim of the Primary Creditor.

Dated the day of A. D., 18 .

X. Y., Clerk.

WARNING TO GARNISHEE AND PRIMARY DEBTOR.

To the above-named Garnishee and the Primary Debtor:

You, the said Garnishee, are hereby notified, that from and after the time of the service of this Summons on you, all debts due or accruing due from you to the above-named Primary Debtor are attached, and if

you pay the same to any one other than to the person holding the proper order to receive the same, or into Court, you will be liable to repay it, in case the Court or Judge so order.

And you, the said Primary Debtor and Garnishee, are hereby notified that if any or either of you desire to set up any Statutory or other defence, or any set-off, or to admit your or either of your liability, in whole or in part, for the amount claimed herein, you must file with the Clerk of this Court *the particulars* of such defence or set-off, or an admission of the amount due or owing by any or either of you, *within eight days after service on you* respectively of this Summons, and that in the absence of notice of such defence or set-off, the Judge in his discretion may give judgment against you for the amount claimed.

[*N. B.—If claim for board or lodging add Memorandum at page 31.*]

SUMMONS TO GARNISHEE AND PRIMARY DEBTOR AFTER JUDGMENT.

No. A. D. 18 .

[Seal.]

In the Division Court in the County of .

BETWEEN A. B., Primary Creditor,

and

C. D., Primary Debtor,

and

E. F., Garnishee.

Judgment recovered on the day of A. D. 18 , in the Division Court in the County of .

Amount unsatisfied, $.

You, the above named Garnishee and the Primary Debtor, are hereby summoned to appear at the sittings of this Court, to be held at on the day of , A. D. 18 , (*or before the Judge presiding at on the day of , A. D. 18*), at of the clock in the forenoon, to state and shew whether or not you, the said Garnishee, owe any, and what debt to the above named Primary Debtor, and why you should not pay the same into Court, to the extent due on the above named judgment, to satisfy the same; and you, the said Primary Debtor and Garnishee, are severally required to take notice, that if any or either of you desires to set up any Statutory or other defence, or any set-off, or to admit any liability of any or either of you, in whole or in part, for the

amount claimed in this action, you shall file with the Clerk of this Court *the particulars* of such defence or set-off, or an admission of the amount due or owing, by any or either of you, *within eight days after service on you* respectively of this summons.

You, or any one interested, may also shew any other cause why the said debt should not go to satisfy the said judgment.

Dated the day of , A. D. 18 .

X.——Y.——Clerk.

WARNING TO GARNISHEE AND PRIMARY DEBTOR.

To the above named Garnishee and the Primary Debtor:

You, the said Garnishee, are hereby notified, that from and after the time of the service of this Summons on you, all debts due or accruing due from you to the above named Primary Debtor are attached, and if you pay the same to any one other than to the person holding the proper order to receive the same, or into Court, you will be liable to repay it, in case the Court or Judge so order.

And you, the said Primary Debtor and Garnishee, are hereby notified that if any or either of you desires to set up any Statutory or other defence, or any set-off, or to admit your or either of your liability, in whole or in part, for the amount claimed herein, you must file with the Clerk of this Court *the particulars* of such defence or set-off, or an admission of the amount due or owing by any or either of you *within eight days after service on you* respectively of this Summons, and that in the absence of notice of such defence or set-off, the Judge in his discretion may give judgment against you for the amount claimed.

[*The change in the law in respect to Garnishment proceedings effected by the Division Courts Amendment Act, 1886,* (ANTE *page 33*), *renders a change in the Forms of Garnishment Summons, as well after as before judgment, necessary. A part of the above Form may seem unnecessary in the case of a Summons after judgment, but, it is rendered necessary by the language of the 12th section of the Act just quoted. It will be observed by a reference to that section and the 136th section of The Division Courts Act, that the provision as to defence and set-off, &c., whether properly or not, is made applicable to cases both before and* AFTER *judgment.*

Until the Board of Judges frame new Forms of Summons and Warning in Garnishment cases, the Judge has the power to prescribe Forms of such proceedings in his own Courts, under the 145th section of The Division Courts Act. The foregoing Forms have been prescribed in the County of Wentworth. If claim for board or lodging add Memorandum at page 31.]

At the last meeting of the Division Courts Clerks' and Bailiffs' Association at Toronto, the writer was desired by that body to express his views on certain questions to be propounded on the construction to be given to several items of The Clerks' and Bailiffs' Tariffs. Several questions have been propounded. Such questions and the answers to them will be found in the following pages.

Two things must be kept in view in construing a Tariff;—

(1) That you cannot go beyond the reasonable import of the language employed to find the meaning to be given to any part of it;

(2) That where work is necessarily performed by an officer a reasonably liberal construction should be given to afford him compensation for such work. In the following answers the writer has endeavored to observe these two views.

QUESTIONS AND ANSWERS ON DIFFERENT ITEMS OF THE CLERKS' AND BAILIFFS' TARIFFS.

CLERKS' TARIFF OF FEES.

(The number of the Item in the Tariff on which the Question is asked will be found noted in the margin.)

Item 2. 1.—In what way is the value of the goods to be ascertained to regulate the fee on issuing Summons in Replevin and Interpleader?

A.—In Replevin the value of the goods will be

determined by the amount sworn to in the Affidavit for Judge's Order for Summons to issue.

In Interpleader cases the Bailiff's duty is to ascertain the value of the goods seized, and on his written application for Interpleader to specify such value therein (Sinclair's D. C. Act, 215, 216, 234, 288) which will be the guide to the amount of the Clerk's fee. The law does not appear to provide for an appraisal in such cases: Sinclair's D. C. Law, 1884, 46.

Item 2. 2.—Should the Clerk issue a Concurrent Summons without special instructions in all cases where there are two or more defendants residing in different Divisions?

A.—In order to charge a plaintiff with the costs of issuing a Concurrent Summons the Clerk should have his express or implied authority for doing so. It can only be issued where there are at least two defendants residing "in different Counties," not in different Divisions merely. Rule 17 is permissive only: Sinclair's D. C. Act, 242. In order to charge the defendants with the costs of it a case of urgent necessity should be shewn.

Item 2. 3.—When a Concurrent Summons is issued, is the Clerk entitled to charge for it as an original writ?

A.—"Concurrent writs are in fact original writs describing defendants as residing in different Counties": Har. C. L. P. Act, 25. Such being the case we think the Clerk is entitled to charge for a Concurrent Summons in addition to the first Sum-

mons, as an original when he has a right to charge for it at all.

4.—What fee, if any, is a Clerk entitled to for adding future days of sittings of the Court to a Special Summons returned not served in time, to make the notice of the sittings of the Court at the foot of "Warning No. 2" available for the information of the defendant? Item 2

A.—No allowance is made for this service.

5.—Where a party about to enter a suit brings to the Clerk a long itemized account, say of 30 folios, without any copy of it, is the Clerk bound to receive the same and enter it, and if he does so can he charge the plaintiff anything more than the sum of 20c. mentioned in item 4, for making out a copy of the claim? Item 4.

A.—The Clerk is not *bound* to receive or enter the claim without a copy of it being furnished him: Sinclair's D. C. Act, 90, 91. Should he do so and make out the copy himself, as Clerk, the above fee of 20c. is all that he could charge: Sinclair's D. C. Act, 239, 339.

6.—Where a case is settled before service of the Summons, is the Clerk entitled to a fee under item 6? Item 6.

A.—Certainly not.

7.—Where the Bailiff is unable to find a defendant to serve with Summons, and so reports in writing on his writ to the Clerk, is that a "return" to the Summons under item 6, entitling the Clerk to his fee? Item 6.

A.—It is. The Bailiff and his sureties would be responsible for the correctness of the return and the Clerk should properly enter it.

Item 6. 8.—Is the Clerk entitled to any fee for distributing the proceeds of attachment where there are several judgment creditors entitled to participate, and upon what principle should the distribution be made?

A.—The Clerk is not entitled to any fee in such case.

The proper mode of distribution of the proceeds would be to apportion to each creditor his proportionate share of the fund to be distributed according to the amount of his judgment—composed of debt, interest and costs. The mode frequently adopted by Clerks of deducting the costs in all the suits, and then giving to each creditor his proportion of the balance is unwarranted by section 197 of the Division Courts Act: Sinclair's D. C. Act, 206, 207.

Item 6. 9.—Is the issuing Clerk entitled to charge 15c. for "Entering return to Summons" served in another Division?

A.—Notwithstanding the opinion of high authority to the contrary, we think he is entitled to this fee under item 6. So far as the question put is concerned, this item may be read thus: "Receiving and Entering Bailiff's return to any Summons * * * * except * * return to Summons * * from another Division." The latter we read as a Summons "*issued*" from another Division, and was intended to mark a distinctness from item 24.

Any other construction would seem unreasonable, for the Clerk of the issuing Court is as much obliged to enter the return from a Bailiff of an outer Division as from the Bailiff of his own Court.

10.—Does this item give a right to the Clerk to charge for entering *any* notice or admission filed by a party to the suit, or is it confined to "notice of defence" or "admission" of indebtedness? Item 7.

A.—The phraseology of this item was changed to enlarge the right of the Clerk to this fee. Compare the item at page 336 of Sinclair's D. C. Act, and at page 9 of the Addenda to Sinclair's D. C. Act, 1880 with the item of the present Tariff to be found at page 278 of Sinclair's D. C. Law, 1885. The Clerk is now entitled to the fee for entering and noting in the Procedure Book *any bona fide* written defence that a defendant may choose to make, or desire to enter, He is entitled also to the same for entering and noting every notice of admission in the Procedure Book; as for instance under section 12 of the Division Courts Amendment Act, 1886, to be found *ante* page 33.

The Clerk should not constitute himself the judge of the propriety, validity or necessity of these proceedings.

11.—Is a Clerk entitled to the fee allowed by item 9 unless he actually prepares the affidavit and administers the oath? Item 9.

A.—The fee is allowed *on condition* that he "actually" prepares the affidavit and not otherwise. "Actually" is defined by Worcester, to mean:—"positively; in act; really; in fact." An

affidavit would be "actually prepared" by the Clerk if prepared by any person acting *for him* for the time being in so doing: *Blades* v. *Lawrence*, L. R. 9 Q. B. 374. It will be seen from the language used that the administering the oath by the Clerk is not *a condition* of his being entitled to the fee, but only that he must, if required, administer the oath without further charge. In cases where the Clerk himself is obliged to make the oath, as under section 152 of the Division Courts Act, (Sinclair's D. C. Act, 170, 171), he would never be entitled to the fee if any other view prevailed.

Item 9. 12.—Does not every affidavit, any party to a suit may offer and which is entered and filed with the Clerk, entitle him to the fee mentioned in item 9?

A.—Certainly not. He is only entitled to it where the affidavit is "actually prepared" by him. See the answer to next previous question.

Item 10. 13.—What copies of papers would a Clerk be entitled to charge for under item 10 for transmission to the Judge on application for new trial?

A.—That must depend on the circumstances of each particular case. For fuller answer see Sinclair's D. C. Act, 339 (*d.*) This item only applies to cases in which "no fee is already provided," and would have no application for instance to copies of Summons under item 3.

Item 11. 14.—Is the Clerk entitled to the fee given by item 11 for every notice of defence entered, whether such notice shews a good defence in law or not, or is not according to the requirements of some Statute?

A.—The duty of the Clerk is ministerial only. It is not his duty to pronounce upon the validity of the notice. If it reasonably purports to be a *bona fide* defence to the action the Clerk should, if the notice be in time, receive and enter it, leaving to the Judge the question of its validity. In such case of course he would be entitled to the fee.

15.—Is not the Clerk entitled to a fee for every notice that he reasonably gives under item 11? Item 11.

A.—He is only entitled to the fee where the notice is one which he is *bound* by law to give to a party or the Judge. If the Judge ordered certain notice to be given, and the Clerk gave it, he would be entitled to the fee.

16.—If the Judge reserves judgment under section 106 of The Division Courts Act, without fixing any date for delivery of it, and on its being delivered the Clerk notifies the parties of it; is he entitled to charge the usual fees for notices? Item 11.

A.—Properly, judgment cannot be delivered in that way except by consent of parties: *In re Burrowes*, 18 C. P. 493, but if it is so delivered we cannot see anything in the Tariff permitting of this charge any more than if judgment had been delivered at an appointed time. In the latter case we see nothing requiring notice to the parties, nor in the case put unless specially ordered.

17.—Is a Clerk entitled to anything for receiving and paying over to a judgment creditor the many small sums which are frequently ordered to be paid on Judgment Summons? Item 12.

A.—He is not. We think, however, the allowance

of a small sum by way of commission, payable by the creditor, would not be unjust to him, and only fair to the Clerk in such cases.

Item 12. 18.—Does the entering a minute in the Procedure Book, under Rule 27, (Sinclair's D. C. Act, 244, 245), entitle the Clerk to a fee under item 12?

A.—It does not. It is not a final judgment.

Item 13. 19.—What fee is a Clerk entitled to on an order of a Judge setting aside judgment entered by the Clerk by default and letting a defendant or other party in to defend?

A.—The sum of 25c.

Item 13. 20.—What fee is a Clerk entitled to on an order of a Judge granting a new trial of a cause?

A.—The sum of 25c. under item 17.

Item 13. 21.—What fee is a Clerk entitled to on an order of a Judge refusing a new trial?

A.—The sum of 50c. It is a "final order." See *Re Waldie* v. *Burlington*, 13 App. R., at page 114; *Great N. R'y Co.* v. *Mossop*, 16 C. B. page 580, S. C. 17 C. B. page 139; *Dodds* v. *Shepherd*, 1 Ex. D. 75; *Re Foley* v. *Moran*, 11 P. R. 316.

Items 13 and 17. 22.—What fee is a Clerk entitled to on an order adjourning the hearing of a cause?

A.—The sum of 25c.

Item 16. 23.—Should there not be an *original* Summons to jurors, with an affidavit of service by the Bailiff, and can same be charged for?

A.—Section 10 of the D. C. Act of 1885, (Sinclair's D. C. Law 1885, 131), now contains the law in regard

to the summoning of jurors. It is there declared how a jury may "be summoned to try the issue." The Summonses to jurors are all originals, being under the hand of the Clerk and the Seal of the Court: Sinclair's D. C. Act, 297. Nothing is said anywhere about a "*copy*" of Summons to a juror. Not so in regard to Summons to witness. He is served with a *copy*: Sinclair's D. C. Act, 125, 126. In view of the consequences of non-attendance by a juror, (Sinclair's D. C. Act. 144), we think the Clerk should properly have a *13th* Summons with the names of all the twelve jurors in it, and that there should be an affidavit of service by the Bailiff attached to it and placed before the Judge at the appointed sittings. Without such we see much difficulty in his imposing a penalty for contempt on non-attendance. The Clerk can, we think, charge 10c. for this Summons under a reasonable construction of item 16 and the necessity of the case: Maxwell on Statutes, Chapter IX., section 2. The affidavit could be charged for under item 9, provided the conditions there imposed were complied with.

24.—Where there are several cases tried by a jury at a sittings, in each of which a request for jury was duly made, how should the cost of summoning the jurors be dealt with? Item 16.

A.—"For the trial of all actions required to be tried by or before a jury at any session of a Division Court," the Clerk shall cause twelve persons liable to serve as jurors to be summoned: Sinclair's D. C. Law, 1885, 131. It follows as a matter of course that the costs of summoning the

jury should be charged in equal proportions to the proper party in each suit. The suitor who first requests a jury should not have to pay *all* the costs of summoning them, but only his proportionate share.

Item 17 25.—Where a case is put on the Judge's List and before it is called in Court, or before the Judge is about to commence the hearing of it, the parties settle the cause, is the Clerk entitled to a fee under item 17 for an order?

A.—We do not think a Judge can make any *order* after the settlement of a case. It is withdrawn by the parties from his authority. They have the right to settle their own cause, and the law encourages the prevention or discontinuance of litigation. Any memorandum that the Judge may make for future reference or the guidance of the Clerk is not *an order* under item 17, nor a judgment "rendered at the hearing or final order made by the Judge," under item 13.

Item 18. 26.—Can a Transcript to the County Court, or a Transcript to another Division Court be issued from any Court other than the Division Court in which the judgment was originally recovered?

A.—It cannot. It must issue from the Court in which judgment was originally recovered.

Item 18. 27.—Is the Clerk entitled to any fee for making out a Certificate of Judgment, to be filed with the Sheriff, under The Creditors' Relief Act or with an Assignee?

A.—There is no allowance for it, but there should be.

28.—What is the proper amount of the Foreign Clerk's fees on a return of "Nulla Bona" to a Transcript? Item 19.

A.—The sum of 15c. under item 1; 50c. under item 19; 15c. under item 6; and 15c. under D. C. Act, 1882; Sinclair's D. C. Law, 1884, 83; together with postage and registration.

29.—When only is a Clerk entitled to a fee for renewal of an Execution under item 20? Item 20.

A.—In order to entitle the Clerk to this fee three things must concur:

(1) The Execution must be in force and unexpired: Sinclair's D. C. Act, 275, Rule 158; Sinclair's D. C. Law, 1884, 97; *Lowson* v. *Canada F. M. Ins. Co.*, 9 P. R. 309, 19 L. J. N. S. 18, S. C.; *Bank of Montreal* v. *Taylor*, 15 C. P. 107; *Price* v. *Thomas*. 11 C. B. 543; *Cole* v. *Sherard*, 11 Ex. 482.

(2) It must be wholly unexecuted. If partly executed before its expiration, for instance by seizure under it, renewal could not be made: Sinclair's D. C. Act, 182. In such case the Bailiff could go on and execute the Writ, even after its expiry: Sinclair's D. C. Act, 175; *Doe Tiffany* v. *Miller*, 6 U. C. R. p. 431.

(3) The renewal can only be made at the instance of the Execution Creditor: The Division Courts Act, section 163.

30.—Is a Clerk entitled to a fee for search on a judgment more than a year old, on which he is instructed to issue Execution? Item 25.

A.—He is not, provided the party designates the suit, but if the person does not know the name of the suit, or cannot otherwise reasonably identify it, and the Clerk has to search therefor, then he is entitled to charge for a search; *per* Hagarty, C. J., in *Ross* v. *McLay*, 26 C. P., pages 199 and 200.

Item 26. 31.—What is the meaning of item 26:—"Taxing costs in defended suits"—and to what cases does it apply?

A.—A defended suit within the meaning of that item is:—

(1) Where it is a case requiring a notice of dispute to be filed, and that such notice is filed.

(2) In Garnishment cases where the amount is disputed under the 12th section of the Division Courts Amendment Act, 1886, *ante* page 33.

(3) In an action on an ordinary Summons where after service, the case is standing for trial and unconfessed: Sinclair's D. C. Act, 170, 268. See Worcester's Dictionary—"Defend."

"Taxing Costs" means a determining of the costs in the suit by the Clerk and more especially where those costs comprise charges other than his own. Costs must be "taxed" even though an action is not defended: Sinclair's D. C. Act, 258, Rule 89, amended by Rule 178 and Form No. 129, to be found at pages 3, 4 and 6, of the Addenda to Sinclair's D. C. Act, 1880.

BAILIFFS' TARIFF OF FEES.

(The number of the Item in the Bailiffs' Tariff on which the Question is asked will be found noted in the margin.)

32.—Whether does item 1 or 6 apply in the case of a Summons in Replevin? Items 1 and 6.

A.—Provision is made by item 1 for an ordinary Summons and by item 6 for cases in Replevin. Item 6 would be the one applicable.

33.—If a Bailiff gets any person to serve a Summons for him, can the Clerk allow the fee for service? Item 1.

A.—It is doubtful if any person but a Bailiff can serve a Summons: D. C. Act, section 45; *Whitehead* v. *Fothergill*, Dra. Rep. 200; *Rattan* v. *Ashford*, 3 O. S. 302; but, assuming that it can be done, we do not think the fee should be taxed, unless the person is a Deputy duly appointed under the 4th section of the Division Courts Act of 1884; Sinclair's D. C. Law, 1884, 80. The Tariff is framed for Bailiffs and not for those who are not.

34.—The Bailiff has 12 Jury Summonses for service and finds that one or more of the persons named by the Clerk as Jurors are dead, or removed from the Division. What is the Clerk or Bailiff to do? Item 3.

A.—By section 5 of the Division Courts Amendment Act, 1885, (Sinclair's D. C. Law, 1885, 131), the Clerk "shall cause *not less than twelve* of the persons liable to serve as jurors to be summoned to attend." He should use all lawful means to have that number present. The Bailiff should

report to the Clerk at once if any of the parties for whom he has jury Summonses are dead, or have gone away, and the Clerk should then take from the list of jurors a sufficient number of additional names to give a return of twelve jurors, and issue Summonses for the persons whose names have been so taken and have the Bailiff serve them in the ordinary way. The primary object of the Statute is to have "*not less*" than twelve jurors, and to this end the endeavours of Clerk and Bailiff should be directed, even though more than twelve Summonses have to be issued.

Item 5. 35.—What is a defended case under item 5?

A.—A reasonable construction of this item we submit is where the plaintiff or defendant has to call a witness or witnesses to prove his contention.

Item 6. 36.—Where a Writ of Replevin is issued against two defendants and served on both, but the goods are found in possession of one of them, is the Bailiff entitled to his fees under items 1 or 6?

A.—The Bailiff would be entitled to the fee prescribed by item 6 (according to the value of the goods), for enforcing the Writ against each defendant.

Items 6 and 9. 37.—Where goods are under seizure by a Bailiff on an Execution in his hands, and another Execution is subsequently placed in his hands, is he entitled on the second Execution to a fee for "enforcing" it under item 6, and also to a fee for "schedule of property seized" under item 9?

A.—He is entitled to a fee for "enforcing" the second Execution. That expression simply means

using such means as the law prescribes under the circumstances for the realization of the money. It does not necessarily comprise a seizure. Worcester, title, "Enforce."

The Bailiff is only entitled to a fee under item 9 for "every schedule of property seized." He was entitled to it in the case put, on the first Execution, but is not on the second. The property being in the custody of the law and in his possession under the first seizure, the Bailiff could not legally make a second seizure. "The goods were already in the custody of the law, being in the Sheriff's hands under the prior writs. *He could not seize them again*, but the writ attached upon them, as if he had seized under it": *per* Robinson, C. J., in *Beekman* v. *Jarvis*, 3 U. C. R. p. 281. See, also *Jones* v. *Atherton*, 7 Taunt. 56; *Saunders* v. *Bridges*, 3 B. & Ald. 95; *Sharpe* v. *Fortune*, 9 C. P. 523; *Barclay* v. *Sutton*, 7 P. R. 14; *McMaster* v. *Meakin*, 7 P. R. 211; *Swift* v. *Cobourg & Peterborough Ry. Co.*, 5 U. C. L. J. 253; Watson on Sheriff 250; Sinclair's D. C. Law, 1885, 171. Therefore if the Bailiff could not make a *seizure* again he would not be entitled to charge for schedule of property "*seized*."

The same rule would apply to the other cases of Attachment or Replevin mentioned in item 9. Besides, reason is against it; no good purpose would be served by it.

38.—An Attachment issues against a debtor on the ground that he has attempted to remove his personal property liable to seizure from one County in this Province to another therein, is the Bailiff Item 6.

entitled to attach not only the goods that the debtor has attempted to remove but his other goods," and is he entitled to his fees on seizure of all?

A.—The duty of the Bailiff is "to attach, seize, take and safely keep *all* the personal estate and effects of the absconding, removing or concealed person within such County," &c., when an Attachment is placed in his hands, and it would be so in the case put. The Bailiff would be entitled to his fees in respect to all the property that he could attach, necessary to satisfy the debt.

Item 7. 39.—A Bailiff has several Summonses, Attachments or Executions against a defendant in his hands in several suits, and makes one journey to serve or execute them all, is he entitled to mileage in each case?

A.—He certainly is: Sinclair's D. C. Act, 344.

Item 7. 40.—Where a Bailiff travels on a Summons against three defendants in one suit, is he entitled to mileage "from the Clerk's office to the place of service" on each?

A.—Certainly not. He is only entitled to mileage on the distance actually and necessarily travelled to serve *all* the defendants: *Corporation of Haldimand* v. *Martin*, 19 U. C. R. 178.

Item 7. 41.—Is a Bailiff entitled to any fees for mileage or otherwise where he has made a seizure on Execution and abandoned it of his own motion or through his own negligence it became abandoned?

A.—Certainly not. His wrongful act cannot be

used by him to obtain fees. The claim should be on him not *by* him.

42.—Is a Bailiff entitled to any fees when he acts upon an Execution or other process that has expired? Item 7.

A.—No. A Bailiff's fees can only be allowed him where he acts upon process that has vitality, force and efficacy. He would be a trespasser to act on any other.

43.—Is a Bailiff entitled to mileage not only on going to seize on an Execution, but on going to sell the goods seized? Item 7.

A.—He is not: *Burwell* v. *Tomlinson*, R. & J's Digest 3563. No provision is made for mileage on going to sell. Any remuneration therefor is covered by the fees prescribed in items 12 and 13.

44.—Can a Bailiff refuse to do any service as such until he is first paid his lawful fees? Item 7.

A.—Before a Bailiff is compelled to act in any proceeding his lawful fees must be first paid by the party at whose instance he is required to act.

45.—Where a Bailiff makes several ineffectual attempts to serve a defendant, and travels many miles in doing so, and at last effects service, is he entitled to mileage for the ineffectual attempts at service? Item 7.

A.—He is not. He is only entitled to mileage on one trip, and the distance to be allowed for is "from the Clerk's office to the place of service."

46.—Is the Bailiff entitled to double mileage in going to seize on an Attachment, and to serve the Item 7.

Summons in the same case, both being effected at the same time?

A.—We think not, but the reason for that opinion is not so clear. In analogy to the case of *The Corporation of Haldimand* v. *Martin*, 19 U. C. R. 178, where it was held that a Sheriff was not entitled to double mileage for the same journey in serving grand and petit jurors, we think a Bailiff could not properly charge mileage in going to execute an Attachment and serve a Summons for the same plaintiff against the same defendant and in the same suit.

Item 8. 47.—A Bailiff arrests a delinquent, and is necessarily compelled to incur heavy expense and disburse largely for conveyance and assistance in taking the person to prison. Is the Bailiff in such a case limited to 12c. a mile for his own mileage and 20c. a mile for carrying the person to prison, or is he entitled to anything in addition to the 20c. a mile if he actually expended the same.

A.—He is not entitled to anything more. The Table of Fees for Clerks and Bailiffs contains everything that is properly chargeable by either officer: Sinclair's D. C. Act, 277; *Macnamara* v. *McLay*, 8 App. R., p. 343; Danforth's U. S. Digest 775.

Item 8. 48.—Is a Bailiff entitled to mileage for travel actually and necessarily performed by him in going to arrest a delinquent under a warrant, or is he only entitled to mileage from the Clerk's office to the place of arrest?

A.—The Bailiff is in such case entitled to mile-

age for the distance actually and necessarily travelled and not merely from the Clerk's office to the place of arrest. The concluding part of item 7 does not, nor could it from the language employed, apply to the case of arrest.

49.—What mileage is a Bailiff entitled to on taking a delinquent to prison under arrest? Item 8.

A.—He is entitled to mileage from the place of arrest to the prison by the ordinary and usual travelled route, at the rate of 20c. *per* mile, all expenses and assistance being included in that sum.

50.—If a delinquent, after being arrested by a Bailiff, escapes from his custody, is the Bailiff entitled to any mileage? Item 8.

A.—He is not; and might under certain circumstances be liable for an escape.

51.—Can the Clerk issue a Warrant of Commitment to a County Constable, and can the latter legally execute it? Item 8.

A.—A Warrant of Commitment can neither be issued to nor executed by a County Constable. It must be issued to the Bailiff, but he may in aid of its execution, call to his assistance any Constable or peace officer of the County: Sinclair's D. C. Act, 196. As remarked by Jervis C. J., in *Gregory* v. *Cotterell*, 5 E. & B., at page 586:—"The law * * requires *the presence* of the responsible officer to control the execution of the Writ."

52.—Is it proper for a Bailiff to take a bond for goods seized under an Execution and then apply for an Interpleader Summons? Item 10.

A.—Goods must be "taken in execution," that is, they must be *seized* before a Bailiff can interplead: *Goslin* v. *Tune*, 2 U. C. R. 177. He must have them in possession himself, or some one for him, at the time of the application: Cababe on Interpleader, 25. If the Bailiff abandons possession he cannot have interpleader: *Braine* v. *Hunt*, 2 Dowl. 391; *Wheeler* v. *Murphy*, 1 P. R. 336; *Maclean* v. *Anthony*, 6 Ont. R. 330. The taking of a bond reciting that upon the Bailiff's being indemnified he has consented "to permit the said goods and chattels to remain in possession of the said defendant, for his, the said defendant's benefit," is undoubtedly an abandonment of the seizure within, *Castle* v. *Ruttan*, 4 C. P. 252, and the other cases cited at pages 176 and 177 of Sinclair's D. C. Act, disentitling the Bailiff to interpleader. See, also, *Craig* v. *Craig*, 7 P. R. 209; *Cropper* v. *Warner*, 1 Cab. & Ellis, 152; *Patterson* v. *McKellar*, 4 Ont. R. 407.

Item 11. 53.—Where goods are seized on an Execution, and before notice of sale other Executions against the defendant come into the Bailiff's hands, what course should he pursue, and would he be entitled to the fee for notices of sale under item 11 on each Execution?

A.—If notice of sale given on each Execution, he would be entitled to the prescribed fees. The usual course is to make three notices of sale, reciting in them all the Executions in his hands. In such case the Bailiff is entitled to notices of sale on each Execution as much as if he gave separate notices in each case.

54.—Can a Bailiff insure property in his possession under Execution, Attachment, or other process? Item 12.

A.—By virtue of the proceedings taken a special property in the goods becomes vested in the Bailiff, which enables him to protect the rights he has acquired, and this property constitutes an insurable interest, which he may protect by obtaining insurance thereon. He would not, however, be under any obligation to do so. Drake on Attachment, 5th Ed., Section 201.

55.—Is a Bailiff entitled to be paid for money disbursed for searches to see if any Bill of Sale or Chattel Mortgage filed against the goods seized or attached, or about to be seized or attached by him. Item 12.

A.—There is no provision for such a case, although we think there should be.

56.—Is a Bailiff entitled to the expense of taking stock of the property seized on execution? Item 12.

A.—There does not appear to be any allowance for it and therefore the Bailiff is not entitled to such charge: *Morrison* v. *Taylor*, 9 P. R. 390; Arch. Pract., 12th Ed., 635; *Grant* v. *Grant*, 10 P. R. 40.

57.—Would a Bailiff be entitled to three per cent. poundage where the Execution Creditor had settled with the debtor and taken a promissory note for the full amount of debt and costs after seizure? Item 13.

A.—This might properly be said to be a satisfaction of the debt, entitling the Bailiff to such poundage under item 13: *McRoberts* v. *Hamilton*, 7 P. R. 95. Arch. Pract., 12th Ed., 636.

Item 13. 58.—Where a Bailiff necessarily travels several miles to enforce a Writ of Execution, but before seizure the Writ is either withdrawn or proceedings upon it stayed by the Execution Creditor, is the Bailiff entitled to anything more than his mileage?

A.—He is only entitled to mileage and receiving.

Item 13. 59.—If a Bailiff secretly becomes the purchaser of goods at a sale under Execution could he obtain any fees?

A,—Certainly not. It would be a void sale: Sinclair's D. C. Act, 189.

Item 13. 60.—Where goods seized are covered by Chattel Mortgage and the Bailiff sells the goods, pays off the Mortgage, applies the balance on his Execution, what poundage is he entitled to?

A.—He is entitled to poundage on the nett amount realized from the sale of the property under the Execution, and not on the money paid to the Mortgagee or on the Bailiff's own fees and expenses: *McRoberts* v. *Hamilton*, 7 P. R. 95; *Michie* v. *Reynolds*, 24 U. C. R. 303.

Item 13. 61.—Can a Bailiff refuse to pay over to the Clerk moneys which he has made on Execution, on the ground that the property was not saleable under the Execution?

A.—He cannot do so. It does not lie in his mouth to say so: *per* Robinson, C. J. in *Hewitt* v. *Jarvis*, 15 U. C. R., page 42. If the money was claimed by a third party the Bailiff might interplead.

Item 13. 62.—Is a Bailiff entitled to any poundage under item 13, if before seizure or sale the defendant pays

him the amount of the execution, and if he exacted poundage, what might be the consequences?

A.—We think not: Sinclair's D. C. Act, 338,339; *The Merchants' Bank* v. *Campbell*, 32 C. P. 170. There is no difference in this respect between the old Tariff and the present one. The present Tariff gives the Bailiff three per cent. if the debt is "satisfied in whole or in part *after* seizure and *before* sale." The consequences of illegally exacting money for poundage or other fee are very serious to any Division Court officer:

(1) For extortion of money by any public officer, he could be indicted for the misdemeanor of malfeasance of office, punishable with fine and imprisonment, or both: Roscoe's Criminal Evidence, 8th Ed., 811.

(2) A Bailiff could be tried by the Judge under section 219 of The Division Courts Act for the illegal exaction of fees: Sinclair's D. C. Act, 225.

(3) He would be liable to repay the amount illegally obtained, whether paid under protest or not: *Corporation of Haldimand* v. *Martin*, 19 U. C. R. 178.

63.—Where a Bailiff distrains for the amount of rent claimed by a landlord and costs, as well as for the amount of the Execution in his hands, under the 212th section of the Division Court Act, how is his poundage regulated? Item 13.

A.—The Bailiff is entitled in such case to poundage on the amount payable to the Execution Creditor, exclusive of his own costs and expenses: *Michie* v. *Reynolds*, 24 U. C. R. 303; *McRoberts* v.

Hamilton, 7 P. R. 95; and his costs for the distress for rent are governed by R. S. O., chapter 65.

Item 13. 64.—Where a seizure is made by a Bailiff on Execution, but before sale the Execution and all proceedings thereon are set aside, is he entitled to any poundage whatever?

A.—He is not: *Walker* v. *Fairfield*, 8 C. P. 95; *Miles* v. *Harris*, 12 C. B. N. S. 550.

Item 13. 65.—Is a Bailiff entitled to poundage on the gross sum realized from the sale or only on what he pays over?

A.—He is not entitled to poundage on anything but the nett sum paid over or going to the Execution Creditor: *Michie* v *Reynolds*, 24 U. C. R. 303; *McRoberts* v. *Hamilton*, 7 P. R. 95. He is not entitled to poundage on what he may be entitled to himself.

Item 13. 66.—Is a Bailiff entitled to any fee, and if so, what, on a return by him of a Warrant of Attachment or Arrest unexecuted?

A.—We do not think he is entitled to any fee in such a case.

Items 13 and 10. 67.—Where a Bailiff procures a necessary Bond to be prepared by a Solicitor or other person, is he entitled to the fee mentioned in item 10?

A.—We think where a Bailiff procures another to prepare a Bond, he is entitled to the fee upon the principle that what a man can do himself he may do by another.

Item 13. 68.—Is a Bailiff entitled to poundage where he

sells perishable property taken by him under Attachment ?

A.—We think that in view of sections 195 and 204 of The Division Courts Act, (Sinclair's D. C. Act, 206, 211), the Bailiff would be entitled to five per cent. on the amount realized. The proceeding might be considered in the nature of Statutory Execution.

69.—Would a Bailiff be entitled to five per cent. under item 13 where the parties had after seizure on Execution, settled the case between themselves ? Item 13.

A.—We think not. He would only be entitled to it on sale of the goods and where the money actually passed through his hands: *Hamilton and Port Dover Ry. Co.* v. *The Gore Bank*, 20 Grant 190.

70.—A Bailiff has an Execution in his hands, and he goes to the defendant's house, shews him the Execution and demands payment. He tells the defendant that in default of payment he must remain in possession and that further proceedings will be taken, upon which the money is paid. Is the Bailiff entitled to five per cent. under item 13 ? Item 13.

A.—We think not; but he would be entitled to three per cent. on the nett amount realized, this in effect being a seizure: *Bissicks* v. *Bath Colliery Co.*, 3 Ex. D. 174; *Consolidated Bank* v. *Bickford*, 7 P. R. 172; *Wadsworth* v. *Bell*, 8 P. R. 478; *Morris* v. *Boulton*, 2 C. L. Cham. 60.

71.—Has a Bailiff any right of action for poundage or other fees against an Execution Debtor, by reason of the Execution being in his hands, or is his sole remedy for fees on the Execution alone ? Item 13.

A.—The Bailiff has in such a case no remedy for poundage or other fees except on the Execution: *Thomas* v. *G. W. Ry. Co.*, 24 U. C. R. 326.

Items 13 and 7.

72.—Can suitors obtain an original Summons for witness from the Clerk, make out copy and serve it themselves, or must they give it to the Bailiff for service?

A.—We think parties can, on obtaining original, make out their own copies of Summons to witnesses and serve them themselves quite independently of Clerk or Bailiff, but no fees could be taxed therefor: *McLean* v. *Evans*, 3 P. R. 154; *Ham* v. *Lasher*, 24 U. C. R. 357.

Items 12 and 13.

73.—Where a Bailiff seizes unthreshed grain, is he justified in incurring the expense of threshing the same for the purpose of its better sale, and would such expense be deductable from the proceeds of sale?

A.—We think the Bailiff should incur such expense, if doing so would result in a better sale of the grain and the sum paid for the threshing would undoubtedly be a disbursement by the Bailiff deductable from the proceeds of sale: *Galbraith* v. *Fortune*, 10 C. P. 109.

Items 12 and 13.

74.—Are the Bailiff's fees and disbursements on executing an Execution subject to taxation by the Clerk?

A.—They are. The Clerk should *particularly* see that nothing more is charged than what is lawful, and where the Bailiff's costs and expenses are out of proportion to the amount realized, the Clerk

should be exceptionally particular, and if necessary bring the matter to the notice of the Judge: *Michie* v. *Reynolds*, 24 U. C. R. 303; *Black* v. *Reynolds*, 43 U. C. R. 398.

75.—Where a claim is made to goods seized under Execution, must the Bailiff interplead where the Execution Creditor is worthless and there is no prospect of the Bailiff's getting his expenses from him if the Claimant succeeds? Items 12 and 13.

A.—The Bailiff interpleads for his own protection. He is not bound to do so, but may take the risk of an action if he chooses. The worthlessness or poverty of the Execution Creditor does not lessen the responsibility of the Bailiff or save the prudential necessity of interpleader.

INDEX.

A

ABSCONDING DEBTORS—
bailiff to retain possession of property attached, 50
and to be allowed expenses for keeping same, 50
if property seized by a county constable, he shall hand same over to bailiff, 50
perishable goods of, disposal of, 51
creditor who directed sale to give bond indemnifying officer, 51
moneys realized by bailiff to be paid over to Clerk, 53
how residue, after satisfying judgments, to be disposed of, 53
what goods of, bailiff can attach, 118
and to what fees entitled, 118

ACCOUNT—
Clerk's right to be furnished with copy of, 105
costs of copy of, made by Clerk, 105

ACTS OF PARLIAMENT—
shall be deemed remedial, 80
to receive fair, large and liberal interpretation, 80

ADDING DEFENDANTS—*See Defendants.*

ADMINISTRATOR—
may be added as a party defendant, 75

AFFIDAVIT—
when Clerk allowed fee for preparing, 107
must be "actually prepared" by him, 107
of service of summonses on jurors to be made by bailiff, 111

APPROPRIATION OF PAYMENTS—*See Payments.*

ARBITRATION—
parties may agree to refer matters in dispute to, 45
agreement to refer to be in writing, 45
and to be filed with Clerk, 45
time for making award may be extended by Judge, 46
witnesses must be examined under oath, 46
unless agreement or statutory provision to the contrary, 46
servants and officers of either party incapacitated from taking part in award, 46

ARBITRATION—*Continued.*
fraudulent conduct of arbitrator alone no defence to an action upon the award, 46
appointment of third arbitrator by two others, 46
enlargement of time for making award, 46
award must fix with certainty amount to be paid, 46
or judgment could not be entered thereon, 46
defective award, 46
costs of, 46, 47, 48
arbitrator must be a disinterested party, 46, 47
arbitrator may be appointed verbally, 47
award must be signed by all arbitrators in presence of each other 47
improper reception or rejection of evidence, 47
if action lapses, reference drops, 47
where subject illegal, 47
felony not subject of, 47
setting aside award, 47
powers of arbitrator, 48
form of order of reference, 48
ASSIGNMENT FOR BENEFIT OF CREDITORS—
payment to creditors valid if *bona fide* security surrendered therefor, 82
nor shall security be invalid when *bona fide* advance made to a debtor, 82
precedence of, subject to lien of execution creditor for costs, 82
where assignment to be filed in provisional judicial districts, 82
where new assignee appointed, estate to vest in him without conveyance, 82
publication of notice, 83
assignee to prepare accounts, 83
and to give notice of dividend sheet, 83
ATTACHMENT—
clerk not entitled to fee for distributing proceeds of, 106
proper mode of distributing proceeds of, 106
what goods of absconding debtor liable to, 117, 118
bailiff's fees for, 118
bailiff not entitled to fee for return of warrant of, unexecuted, 126

B

BAILIFF—
when suspended, process may be directed to be served and executed by bailiff of next Division, 23
or by such other bailiff or person as the Judge or Clerk orders, 23
duty of, to ascertain value of goods in interpleader cases, 104
responsible for correctness of return to summons, 106
affidavit of service of summonses on jurors to be made by, 111
fee of, for enforcing summons in replevin, how fixed, 115
doubtful if service of summons good, unless by, 115
duty of, when any jurors chosen, dead or removed from his Division, 115
fees of, for calling parties and witnesses in defended cases, 116
"defended case," meaning of, 116
fees of, when writ of replevin issued against two defendants, 116
but goods in possession of one, 116
entitled only to fee for "enforcing" second execution, 116
"enforcing," meaning of, 116
entitled to one fee for every schedule of property seized, 117
duty of, in attaching goods of absconding debtor, 118
to what fees entitled, 118
entitled to mileage in each case in serving summonses, &c., on one defendant in several suits, 118
to what mileage entitled in serving several defendants in one suit, 118
not entitled to mileage when he wrongfully abandons seizure made, 118
not entitled to fees when acting on an expired execution, &c., 118, 119
no mileage allowed to, on going to sell goods seized, 119
not compelled to act until fees paid, 119
not allowed mileage for ineffectual attempts to effect service, 119
when not entitled to double mileage, 119, 120
not allowed extra expenses incurred in arresting a delinquent, 120
when allowed mileage for distance actually travelled, 120
amount of mileage allowed in taking delinquent to prison, 120, 121
not allowed any if prisoner escapes, 121
Clerk must issue warrant of commitment to, 121
must seize goods before interpleading, 121

BAILIFF—*Continued.*
cannot interplead after abandoning possession, 121
taking of bond equivalent to abandoning seizure, 122
fees of, for notices of sale where several executions in his hands, 122
has an insurable interest in property seized, 122, 123
not bound to insure, 123
not allowed disbursements for searching as to chattel mortgages, &c., 123
not entitled to expense of taking stock, 123
poundage allowed to, when promissory note given in payment after seizure, 123
mileage allowed to, where execution withdrawn before seizure, 123
cannot purchase at sale under execution, 123, 124,
entitled to poundage on net amount only realized from sale, 124, 125, 126
cannot refuse to pay over money to Clerk on ground that goods not liable to seizure, 124
exaction of poundage by, if amount of execution paid before seizure, illegal, 124, 125
how poundage regulated when he distrains for rent as well as on execution, 125
not entitled to poundage where execution set aside, 125
not entitled to fee on return of warrant of attachment or arrest unexecuted, 126
entitled to fee for bond prepared by solicitor, &c., 126
amount of poundage entitled to on sale of perishable property, 126
where case settled between parties, 126, 127
amount of poundage entitled to where amount of execution paid before sale, 127
only remedy for poundage, &c. is on the execution, 127
summonses to witnesses need not be served by, 127
may incur expense of having grain seized threshed, 128
fees, &c. of, subject to taxation by Clerk, 128
poverty of execution creditor does not lessen duty of, to interplead, 128
BOARDING-HOUSE KEEPER—
garnishment by and lien of, 15

BOND—
seizure abandoned when taken by bailiff, 121, 122
bailiff entitled to fee for, when prepared by solicitor, &c., 122

C

CERTIFICATE OF JUDGMENT—*See Judgment.*
CHATTEL MORTGAGE—
bailiff not allowed disbursements for searching for, 123
CLERK, DIVISION COURT—
to keep record of all summonses, notices filed, orders, judgments and executions, 11
how fee regulated in replevin and interpleader, 103, 104
when to issue concurrent summons, 104
costs of issuing, 104
not entitled to fee for adding future days of sittings when special summons not served in time, 105
not bound to receive claim without being furnished with copy, 105
costs of copy of claim made by, 105
no fee allowed to, where case settled before service of summons, 105
entitled to costs of "return" to summons when defendant not found, 106
not entitled to fee for distributing proceeds of attachment, 106
how proceeds to be distributed, 106
entitled to costs of entering return of summons served in another division, 106
entitled to fee for entering any *bona fide* written defence and notice of admission in procedure book, 107
when allowed fee for preparing affidavit, 107
must be "actually prepared" by him, 108
what copies of papers entitled to charge for on transmission to Judge on application for new trial, 108
duty of, to enter any *bona fide* notice of defence, 109
not to inquire into question of validity, 109
entitled to fee for entering, 109
entitled to fee, only when bound by law to give notice, 109
not entitled to fee for giving notice of judgment when reserved, 109
not entitled to fee for paying over small sums ordered to be paid on judgment summons, 109

CLERK, DIVISION COURT—*Continued.*

not entitled to costs of entering minute in procedure book, 110
what entitled to on order setting aside judgment entered by default, 110
what fee entitled to on order for a new trial, 110
what fee entitled to on order refusing a new trial, 110
what fee entitled to on order adjourning hearing of a cause, 110
not entitled to fee for order, after case settled, 112
not entitled to fee for certificate of judgment to be filed with sheriff or assignee, 112, 113
when entitled to fee for renewal of execution, 113
not entitled to fee for a search on judgment more than one year old, 113, 114
unless name of suit not given, 114
duty of, when any juror, dead or removed from his division, is chosen, 115
cannot issue warrant of commitment to county constable, 121
but to the bailiff, 121
to tax bailiff's fees, &c., 128

COMMISSION—

upon application for, Judge ought to be satisfied that claim is one the court ought to try, 26
general rules on which commission will be ordered, 26, 27
if evidence taken under, and not used, costs of, will be disallowed, 27

COMPENSATION TO WORKMEN—*See Workmen.*

CONCURRENT SUMMONS—

to charge plaintiff with costs of, Clerk to have express or implied authority for issuing, 104
only to be issued when defendants in different counties, not divisions merely, 104
to charge defendants with costs of, urgent necessity to be shown, 104
costs of, in addition to original allowed as an original, 104

CONTRACT—

personal action may be joined with action on, 13, 14
provided whole amount claimed does not exceed $100, 13, 14
actions on, to $100 may be brought in Division Court, 14

COSTS—
if suit within jurisdiction of Division Court, brought in High Court, Division Court costs only allowed. 15
where order made transferring cause pending application for prohibition, defendant is entitled to costs of application, 15
of application for order for names of partners in firm, 79
of concurrent summons, 104
in addition to original summons allowed as an original, 104
of copy of claim made by Clerk, 105
not allowed to Clerk when case settled before service of summons, 105
of "return" to summons when defendant not found allowed, 106
of entering return to summons served in another division allowed, 106
of entering any *bona fide* defence, &c. in procedure book allowed to Clerk, 107
of affidavit when allowed to Clerk, 107
Clerk entitled to, for entering any *bona fide* notice of defence, 109
not to inquire into question of validity, 109
Clerk entitled to, only when bound by law to give notice, 109
of giving notice of judgment reserved not allowed, 109
of service of summonses on jurors, 111
when several cases to be tried at one sittings, 111, 112
taxing of, in defended suits, 114
"defended suit," meaning of, 114
"taxing costs," meaning of, 114
bailiff not compelled to act before paid, 119
bailiff not entitled to, on return of warrant or attachment or arrest unexecuted, 126
bailiff entitled to, for bond prepared by solicitor, &c., 126
of bailiff subject to taxation by Clerk, 128

COUNTER-CLAIM—
is a statutory defence, 41

COUNTY CONSTABLE—
cannot execute warrant of commitment, 121

COUNTY JUDGE—
with certain others may appoint and alter number, limits and extent of divisions, 1, 8
to notify other officers of any application to alter divisions, 2, 3 and time and place when same will be considered, 2, 3, 9

COUNTY JUDGE—*Continued.*
unless jury demanded, to be sole Judge in actions in Division Court, 14
cannot make any order after settlement of case, 112

D

DEBTOR—*See Primary Debtor—*
DEFENCE—
withdrawal of, 71
form of withdrawal of, 71
notice of, clerk obliged to enter, 109
DEFENDANTS—
may be added by order of Judge at any time, 73, 75
when added to be served with copy of original summons, 73, 75
summons to be properly amended before serving new defendant, 73, 75
service may be dispensed with on consent, 73, 75
individual members of firm may be added as, 74
not to be added on an *ex parte* application, 75
administrator or executor of, may be added as, 75
DEFENDED CASE—
meaning of, 116
DISTRESS—*See Landlords and Tenants.*
DIVISION COURTS—
not courts of record, 61
DIVISIONS—
County Judge, &c., may appoint and alter number, limits and extent of, 1
on separation of Junior from Senior County, to continue same till altered by Judge, &c., 5
on alteration of, proceedings to be continued in such Division Court as Judge directs, 6
on separation of Junior from Senior County, Judge, &c., to appoint number, limits and extent of, 8
and time when such change shall take place, 8

E

EMPLOYER—
what included by, 85
ENTRIES—
copy of, certified by clerk, to be admitted in all courts as evidence, 11

R

EVIDENCE—
of witness whose attendance at trial cannot be obtained;
Judge may make order appointing some person to take, 67, 68
copy of order and notice of examination to be served on opposite party, 57, 62, 63, 64
how evidence to be taken, 57, 62, 64
costs of order and examination, 57, 62
circumstances under which order will be made, 58, 59
where witness in state of pregnancy, 58
examination *de bene esse*, 58, 59
examination of parties themselves, 59
application for order should not as a rule be made *ex parte*, 59, 60
general rules as to when order will be granted, 60
no mode of enforcing attendance of witness, 61, 62
order must state names of witnesses to be examined, 61
by whom affidavit to be made, 61
objections ought to be made before examiner, 64
irregularity in taking deposition, 64
if witness able to attend trial, deposition could not be used, 64
onus of shewing facts to exclude deposition on party opposing its reception, 64
either party could use deposition as evidence, 64
form of affidavit to obtain order, 65
form of notice of application for order, 66
form of order, 67
of witness who resides in remote part of Province;
Judge may make order appointing some person to take, 68, 69

EXECUTION—
against partners, 74
when clerk entitled to fee for renewal of, 113
bailiff's fee for enforcing second execution, 116
bailiff acting on, if expired, entitled to no fees, 118, 119
when withdrawn before seizure on, mileage only allowed to bailiff, 123
sale to bailiff under, void, 124
if set aside, no poundage allowed, 125
when amount of, paid before sale after seizure poundage allowed on lower scale, 127
bailiff's only remedy for poundage, &c., is on the execution, 127

EXECUTOR—
may be added as a party defendant, 75

F

FIRMS—*See Partners*—
FOREIGN CLERK—
fees of, on return of "nulla bona" to a transcript, 113
FUR-BEARING ANIMALS—
close periods for hunting, 96, 97
possession of, and exposure to sale, how far lawful, 96
trapping of, partly forbidden, 97
penalties for hunting in close season and how enforced, 97
fine to be paid to prosecutor, 97
unless collusion appears, 97
confiscation of game to follow conviction, 97
preserves for game protected, 98
taking or killing of, by poison prohibited, 98
certain animals not to be killed for export, 98
fine to be imposed for such offences, 98
hounds not to run at large during certain periods, 98
fine to be imposed for such offence, 98
inspectors of game, how appointed, 98
duties of inspectors, 98
Form of inspector's deposition, 99
Form of search warrant to be issued, 99

G

GAMBLING DEBT—
note given for, not suable in a Division Court, 15
even though in the hands of an innocent holder for value, 15
GAME—
close periods for hunting, 96
possession of, and exposure for sale, how far lawful, 96
taking possession of eggs entirely prohibited, 97
trapping partly forbidden, 97
use of batteries and night-hunting of wild fowl forbidden, 97
close season for fur-bearing animals, 97
penalties imposed and how enforced, 97
fines to be paid to prosecutor, 97
unless collusion appears, 97
confiscation of, to follow conviction, 97

GAME—*Continued.*
preserves for, protected, 98
killing or taking of, by poison prohibited, 98
certain animals not to be killed for export, 98
fine to be imposed for such offences, 98
hounds not to run at large during certain periods, 98
fine to be imposed for each offence, 98
inspectors of, how appointed, 98
duties of inspectors, 98
Form of inspector's deposition, 99
Form of search warrant to be issued, 99
GARNISHEE PROCEEDINGS—
parties may set up statutory or other defence or set-off, 33, 40, 41
or admit liability in whole or in part, 33, 41
particulars of defence or set-off or admission to be filed with clerk, 33, 41
clerk to send copy of such to other parties, 33, 41
primary creditor may file notice admitting defence or set-off or accepting admission as correct, 33, 41
clerk to send copy of such notice to garnishee, 33, 42
if no notice of defence or set-off filed Judge may give judgment against primary debtor or garnishee, 33, 42
if primary creditor does not file notice admitting or rejecting defence, set-off or admission, garnishee need not attend trial, 33, 42
and sum admitted as due by garnishee shall be taken as correct, 33, 42
unless Judge otherwise orders, 33, 42
costs of notices to be costs in the cause, 34, 43
all parties interested may shew cause, &c., 34
may be taken although judgment more than six years old, 42
a debt due by a firm cannot be attached in partnership name 43
where trust moneys garnished all parties should be before Court, 43
must be against individual members of a firm, 76
form of summons to primary debtors (before judgment) and garnishee, 100
form of summons to garnishee and primary debtor (after judgment), 101

GARNISHEE PROCEEDINGS—*Continued.*
form of warning to garnishee, 100, 102
GARNISHMENT—
by innkeeper and boarding house keeper, 15
untaxed costs, when due are subject of, 15
where debt garnished is for wages, memorandum to be attached to summons, 29, 31, 32
wages or salary cannot be garnished if amount not due, 29, 30
form of memorandum on summons where debt garnished is for wages, 31
A debt which is subject of, must be due to judgment debtor alone, 42
what is subject of, 43
where money not attachable ordered to be paid over in proceeding to which no cause shewn, 43
garnishee has same right of defence against attaching creditor as he would have in an action by judgment debtor 43, 44
GENERAL SESSIONS—
resolutions and orders as to the Divisions not to be altered or rescinded till after notice at, 1, 3, 8

I

INNKEEPER—
garnishment by, and lien of, 15
INSURABLE INTEREST—
of bailiff in goods seized, 122, 123
INTERPLEADER—
if bailiff has more than one execution against same property he may apply for order in names of all execution creditors, 55
costs must be on Division Court scale, 55
all execution creditors must be served, 56
in proceedings in High or County Courts sheriff must bring Division Court execution creditors into application too, 56
validity of judgment may be tried in issue, 56
but it could not be impeached for mere irregularity, 56
bailiff's duty to ascertain value of goods in, 104
and to specify value in application for, 104

INTERPLEADER—*Continued.*
which will be guide to amount of Clerk's fee, 104
appraisal in, not provided for, 104
bailiff must seize goods before interpleading, 121
if bailiff abandons possession he cannot have 121
bailiff abandons seizure by taking bond, 122
a prudential necessity though execution creditor worthless, 128

J

JUDGE—*See County Judge.*
JUDGMENT—
Form of minute of, where personal action joined with action on contract, 15
in action on promissory note, note to be filed with clerk before, 21
when reserved, clerk not entitled to fee for giving notice of, unless Judge so orders, 109
transcript of, must issue from court where recovered, 112
certificate of, clerk not entitled to fee for, 112, 113
fees of foreign clerk on return of "nulla bona" to a transcript of, 113
more than one year old, fee on search for, 113
JUDGMENT CREDITORS—
clerk not entitled to fee for distributing proceeds of attachment to, 106
mode of distribution to, of proceeds of attachment, 106
clerk not entitled to fee for paying small sums to, on judgment summons, 109
JUDGMENT SUMMONS—
where judgment against firm, each member subject to, 76
clerk not entitled to fee for paying to judgment creditor small sums ordered to be paid on, 109
JUNIOR COUNTY—
on separation of, from senior, Division Courts continue till altered by Judge, &c., 5
Judge, &c., of, to be tribunal to alter number and limits of divisions in, 5
on separation of, from senior, Judge, &c., to appoint number, limits and extent of divisions, 8

JURISDICTION—
personal actions to $60 and actions on contract to $100 may be combined, 13, 14
provided whole amount claimed does not exceed $100 13, 14, 15
finding of court upon claims so joined to be separate, 13, 14, 15
if action within jurisdiction of Division Court brought in High Court, Division Court costs only will be allowed, 15
unless justified by circumstances, 15
note given for gambling debt or for liquor drunk in a tavern not suable in Division Court, 15
even though in the hands of an innocent holder for value, 15
JURORS—
original summons to be served on each of, 111
affidavit of service to be made by bailiff, 111
when clerk entitled to costs of summons and affidavit, 111
costs of summoning, when several cases to be tried by, 111, 112
how appointed, when any of those in original summonses found to be dead or removed, 115, 116

L

LANDLORDS AND TENANTS—
right of re-entry granted after rent due for 15 days, 95
with persons under disability, guardian or committee may consent to assignment of leasehold interest, 95
but subject to approbation of Surrogate Judge of County where land situate, 95
how right of mortgagee to distrain limited, 95
LIEN—
of innkeeper and boarding-house keeper, 15
LIMITATIONS, STATUTE OF—*See Statute of Limitations.*
LIQUOR—
note given for liquor drunk in a tavern not suable in Division Court, 15
even though in the hands of an innocent holder for value, 15

M

MASTER AND SERVANT—
agreements made with residents out of Ontario for service therein to be void, 84

MASTER AND SERVANT—*Continued.*
not to apply to prevent employment of skilled workmen not resident in Canada when necessary, 84
not to apply to teachers, actors, &c., 84
MATERIAL WITNESS—
what is, 58
MILEAGE—
bailiff, in each case, entitled to, in serving summons, &c., on a defendant in several suits, 118
bailiff entitled to, in serving several defendants in one suit, 118
bailiff not entitled to, when he abandons seizure made, 113
bailiff not entitled to, on going to sell goods seized, 119
not allowed to bailiff for ineffectual attempts to effect service, 119
when bailiff not entitled to double mileage, 119, 120
allowed to bailiff for distance actually travelled in arresting a delinquent, 120
amount of, allowed to bailiff in taking a delinquent to prison, 120, 121
not allowed any if prisoner escapes, 121
allowed when execution withdrawn before seizure, 123
MORTGAGE—
how right of, to distrain for interest, limited, 95

N

NECESSARY WITNESS—
what is, 58
NEW TRIAL—
what copies of papers clerk entitled to charge for on transmission to Judge in application for, 108
what fee clerk entitled to on order for, 110
what fee clerk entitled to on order refusing, 110
NOTICE—
to alter resolutions or orders as to divisions must be given at General Sessions, 1, 3, 8
clerk to keep record of, filed, 11

O

ORDER—
form of, dispensing with filing of note before judgment, 22

ORDER—*Continued.*
for new trial, fee of clerk on, 110
refusing new trial, fee of clerk on, 110
adjourning hearing of a cause, fee of clerk on, 110

P

PARTIES—*See Defendants.*
PARTNERS—
may sue and be sued in firm name, 73, 75
parties not bound to sue in firm name, 73, 75
summons may be served on any member of firm, 74, 75
service on member of a foreign firm not binding, 76
affidavit of service to state partner served, 74, 75
order may be obtained directing firm to disclose names of, 74, 75
execution against, 74, 76, 77
individual members of firm may be added as defendants, 74, 76
garnishee proceedings must be against individual members of firm, 76
any member of firm subject to a judgment summons, 76
affidavit of service of summons on, 77
Form of demand for name and residence of, 77
Form of declaration in answer thereto, 78
Form of notice of application for order for names of, 78
Form of order for statement of names of, 79
Form of judgment against firm, &c., 79
PAYMENTS—
in the absence of directions, how to be applied, 36
appropriation of, to save Statute of Limitations, 37
PERSONAL ACTIONS—
may be joined with actions on contract, 13, 14
provided whole amount claimed does not exceed $100, 13, 14
may be brought in Division Court where amount claimed does not exceed $60, 14
POUNDAGE—
allowed when note given as payment after seizure, 123
allowed on net proceeds of sale only, 124, 125, 126
not allowed if debt paid before seizure, 124, 125
where allowed to bailiff distraining for rent as well as on execution, 125
not allowed if execution set aside, 125
amount bailiff entitled to on sale of perishable property, 126
where case settled between parties, 126, 127

S

POUNDAGE—*Continued.*
amount bailiff entitled to when amount of execution paid before sale, 127
bailiff's only remedy for, is on the execution, 127
PRIMARY DEBTOR—
Form of summons to, (before judgment), 100
Form of summons to, (after judgment), 101
Form of warning to, 100, 102
PROHIBITION—
where order made transferring cause pending application for, defendant entitled to costs of application, 15
will not be ordered where Judge finds that article in dispute is a chattel and not part of the freehold, 15
PROMISSORY NOTE—
in actions on, note to be filed with Clerk before judgment, 21
unless otherwise ordered, or loss or some other satisfactory reason shown, 21
Form of order, 22

R

REMOTE PART OF PROVINCE—
meaning of, 68, 69
RENT—
action for, 16
REPLEVIN—
how value of goods ascertaind in, 103
how bailiff's fee for enforcing summons in, fixed, 115
bailiff's costs of writ of, when issued against two defendants, 116
but goods in possession of one, 116

S

SALARY—
not subject of garnishment, if amount not due, 29, 30
SENIOR COUNTY—
on separation of junior from, Division Courts continue till altered by Judge, &c., 5
on separation of junior from, Judge, &c., to appoint number, limits and extent of divisions, 8
SET-OFF—
is a statutory defence, 41
SIGNATURE—
where amount ascertained by, Division Court has jurisdiction up to $200, 14

SPLITTING CAUSE OF ACTION—
separate plaints for several instalments of rent is a, 16
correctness of this law questioned, 16, 17, 18, 19, 20
STATUTE OF LIMITATIONS—
plea of, said to be a plea to the merits, 34
rules as to when the time begins to run, 34, 35, 36, 37, 38, 39, 40
in action for fraudulent misrepresentation, 34, 40
solicitor's bill of costs, 35
actions against personal representatives, 35, 40
actions by administrators, 35
subsequent promise to pay, 35, 36
must be unconditional and certain, 35, 36
account stated by executor, 35
promise to administrator before letters of administration granted, 35
different items in running account, 35, 36
promise by one of several joint and several debtors, 36
where portions of claim and set-off both barred, 36
note not properly stamped, 36
where a settlement and statement of accounts has been had, 36
crediting account against plaintiff, 36
admission by executor *de son tort*, 36
physical weakness merely will not invalidate an acknowledgment, 37
mortgage presumed to be satisfied after twenty years, 37
trust moneys not subject to operation of, 37
action on covenant to indemnify, 37
debt barred in foreign country, 37, 39
claim of executor against testator's estate, 37
exceptions in favor of a trustee, 37
claim for partnership accounts, 37, 38, 40
action for malicious prosecution, 37
appropriation of money to save operation of statute, 37
action on covenant in mortgage, 37
action on judgment, 38
action for work performed during infancy, 38
action against Clerk of municipality for omitting names from collector's roll, 38
action by married woman, 38
what is sufficient to take case out of statute, 38, 39, 40
what necessary to keep debt alive in the Division Court, 39
action for money lent by cheque, 39
in action of detinue, 39, 40

STATUTE OF LIMITATIONS—*Continued.*
compulsory payment of interest, 40
conditional promise, 40
action on promissory note payable after demand, 40
court has authority to prevent a solicitor from pleading, 37
when statute has begun to run it continues, notwithstanding subsequent disability, 37
a special limitation in a statute supersedes any general limitation in, 38
an executor may pay a debt barred by, 39
STATUTES—*See Act of Parliament*—
36 Vic. c. 8 (O) (Administration of Justice), 55
37 Vic. c. 13 (O) (Attachment of Debts), 30
R. S. O., c. 1, s. 8, ss. 23, (Interpretation), 75
ss. 33, (Interpretation), 3, 10
ss. 38, (Interpretation), 80
c. 25, s. 17, (Heir and Devisee Commission—duty of Clerk),9
R. S. O., c. 47, (Division Courts), 81
s. 7, (Division Courts—Nature), 61
s. 11, (" —Alteration of Limits), 1
s. 13, (" —Separation of Counties), 5
s. 14, (" —Alteration of Divisions), 6
s. 17, (" —By whom Divisions altered),8
s. 37, (" —Record of Writs, &c.), 11
s. 45, (" —By whom service made), 115
s. 54, (" —Jurisdiction), 13
s. 59, (" —Splitting Actions), 16
s. 68, (" —Entry of Claim), 21
s. 74, (" —Execution of Process), 23
s. 80, (" —Dispute), 42
s. 95, (" —Subpœnas), 24
s. 97, (" —Disobeying Subpœna), 61, 62
s. 98, (" —Subpœnas), 25
s. 99, (" —Commissions), 26, 70
s. 104, (" —Evidence), 70
s. 100, (" — "), 26
s. 125, (" —Garnishment), 30, 52
s. 126, (" — "), 30
s. 130, (" — "), 29, 31
s. 133, (" — "), 29, 31

STATUTES—*Continued.*

R. S. O., c. 47 s. 136, ss. 2, (Divison Courts—Garnishment), 102
s. 136, (" — "), 33, 34
s. 145, (" —Postponement), 32, 42, 102
s. 147, (" —Arbitration), 45
s. 154, (" —Costs), 79
s. 163, (" —Renewal of Execution), 113
s. 171, (" —Execution), 56
s. 182, (" —Examination), 61
s. 195, (" —Attachment), 126
s. 199, (" — "), 50
s. 204, (" — "), 52, 126
s. 205, (" — "), 52
s. 206, (" — "), 53
s. 210, (" —Interpleader), 55, 56
s. 212, (" —Distress for Rent), 125
s. 217, (" —Contempt of Court), 61
s. 219, (" —Illegal Exaction of Fees), 125
s. 244, (" —Practice), 46
R. S. O., c. 50, (Common Law Procedure), 46
c. 50, s. 213, (Common Law Procedure—Awards), 46
s. 318, (" " " —Garnishment), 30
s. 319, (" " " — "), 30
c. 54, s. 11, (Interpleader—consolidation), 55
c. 62, ss. 12-14, (Witnesses and Evidence—affirmations), 62
c. 65, (Distresses for Small Rents), 125
c. 98, s. 4, (Transfer of Real Property—partition), 16
c. 108, (Limitation of Actions), 34, 35, 36, 37, 38, 39, 40
c. 117, (Written Promises), 35
c. 117, s. 2, (Written Promises—joint contractors), 36
c. 133, s. 8, (Master and Servant—agreements), 84
43 Vic., c. 8, (O) (Division Courts), 81
43 Vic., c. 31 (O) (Protection of Game), 96
44 Vic., c. 5, (O) (Judicature Act) 57
rules 8, 346, (O) (Judicature Act—execution against partners), 76
rules 40, 346, (O) (Judicature Act—service on partners), 75
47 Vic., c. 9, (O) (Division Courts), 81
c. 9, s. 1, (O) (Division Courts—Garnishment), 30
s. 4, (O) (" " —Agent of Corporation), 115
c. 19, (O) (Property of Married Women), 38
48 Vic., c. 14, (O) (Division Courts), 81

STATUTES—*Continued.*
48 Vic., c. 14, s. 4, (O) (Division Courts)—Motion for Judgment), 71
s. 5, (O) (" —Summoning of Jurors), 115
s. 6, (O) (" —Interpleader), 56
c. 26, s. 3, (O) (Assignment for Benefit of Creditors—*bona fide* Sales), 82
s. 9, (O) (Assignment for Benefit of Creditors—Precedence of), 82
s. 12, (O) (Assignment for Benefit of Creditors—Publication), 82, 83
49 Vic., c. 16, s. 13, (O) (Statute Amendment Act—Interpleader), 56

SUBPŒNA—
parties may obtain, from clerk, 24
witness may be served with, any place in Province, 24

SUMMONS—*See Concurrent Summons.*
where case settled before service of, clerk entitled to no fee, 105
clerk entitled to costs of entering return of, when defendant not found, 105
clerk entitled to costs of entering return to, when service in another division, 106
each juror to be served with an original, 111
affidavit of service to be made by bailiff, 111
validity of service of, by person not a bailiff, doubtful, 115
fee for service not to be taxed unless such person is deputy, 115
to witness need not be served by bailiff, 127

T

TAKING STOCK—
bailiff not allowed expense of, 123

TARIFF—
construction of, 103
reasonable import of language to be taken, 103
to be liberal, to afford compensation when work necessary, 103
questions and answers—clerk, 103-114.
questions and answers—bailiff, 115-128

TAXING COSTS—*See Costs.*

TIME—
computation of, in garnishee proceedings, 41
general principle of computation, 62
for withdrawal of defence 71
computation of, in proceedings by workmen for compensation 93

TRANSCRIPT—*See Judgment.*

W

WAGES—
not subject of garnishment, if amount not due, 29, 30
WARRANT OF COMMITMENT—
must be issued to the bailiff, 121
WITNESSES—*And see Evidence.*
parties may obtain subpœnas for, from clerk, 24
resident in another county entitled to county court fees and mileage. 25
fees of, may be taxed although no subpœna issued, 25
but on division court scale only, 25
if brought from beyond limits of Province, fees of, may be taxed 26
provided amount does not exceed costs of a commission, 26
county court tariff for, 28
examination of witnesses whose attendance at trial cannot be obtained, 57
examination of hostile witnesses, 63
bailiff's fees for calling, 116
WORKMEN—
"person who has superintendence entrusted to him"—meaning of, 85
"employer"—what included by, 85
"workman"—meaning of, 85
"packing"—meaning of, 85
when employer liable for personal injuries sustained by, 85, 86
when railways liable for injuries sustained by, 86
when not entitled to compensation or remedy, 87
amount of compensation to, limited, 87
time limited in which action may be brought by, 87
contract or agreement not to constitute a defence to action, 88
unless some adequate consideration appears, 88
money payable to workmen under penalty imposed by statute to be deducted from compensation, 88
form of notice of injury, 89
how notice of injury to be served, 89
particulars of demand for compensation, 89
assessors may be appointed to fix compensation by Court or Judge, 90
when application for appointment to be made, 90
application to be filed and served, 90
form of application, 90
application may be made by both parties to the action, 91
Judge may appoint additional assessors, 91

WORKMEN—*Continued.*

$4 for each assessor to be deposited with application filed, 11
assessors to sit with Judge, 92
defendant may apply to have separate actions consolidated, 92
such application to be upon notice, 92
or defendant may apply for stay of proceedings in all actions but one, 92
such application either upon notice or *ex parte*, 92
order staying proceedings obtained *ex parte* may be varied or discharged, 92
but plaintiffs may proceed for costs incurred, 92
defendant may give notice of admission of liability, 92
amount of compensation for each plaintiff to be found separately, 92
in computing time Sunday not counted, 93
Rules and procedure of Court in absence of special provision to prevail, 93
how Insurance Societies of Railways &c., affected by Act, 94

WRIT OF ATTACHMENT—*See Attachment.*

CLASSIFIED INDEX OF FORMS.

AFFIDAVIT—
for order to examine a sick, aged or infirm witness, 65
of service of summons on partnership firm, 77

APPLICATION—
form of, for appointment of assessors, 90

DECLARATION—
in answer to demand for names and residence of members of firm, 78
of game Inspector, 99

DEFENCE—
withdrawal of, 71

DEMAND—
for statement showing names and residence of members of firm, 77

GARNISHEE SUMMONS—
memorandum on, where debt garnished is for wages or salary, 31

JUDGMENT—
where personal action joined with action on contract, 15
against a firm, &c., 79

NOTICE—
of application for order to examine sick, aged or infirm witness, 66
of application for order for names of members of firm, 78
of injury sustained by workman, 89
of warning to garnishee and primary debtor, 100, 102

ORDER—
dispensing with filing of note before judgment, 22
referring matters in dispute to arbitration, 48
for examination of sick, aged, or infirm witness, 67
for statement of names of members of firm, 79

SEARCH WARRANT—
obtained by game Inspector, 99

SUMMONS—
to primary debtor (before judgment) and garnishee, 100
to garnishee and primary debtor (after judgment), 101